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CORRECTIONS.

P. 30 WEINER *v.* CENTRAL FUND FOR GERMAN JEWRY. Counsel in this case were : *J. Valetta* for the plaintiff : *H. Wynn Parry, K.C.*, and *A. S. Diamond* for the defendants.

P. 71. *Re* KAY AND LOVELL, l.A.5. Read : Even assuming that, there is not before me a motion or summons to discharge or vary the certificates . . .

l.F.4. For " a satisfactory remuneration " read " an excessive remuneration."

l.H.2, should read thus : the date to which the trustee in bankruptcy's title relates back . . .

P. 111. KING *v.* KING. In this case the solicitors for the respondent were *A. W. H. Harvey & Son*, Penzance, for whom *Burton, Yeates & Hart* were agents.

P. 275. DEANE *v.* EDWARDS & CO., LTD. Cases referred to (3) : add 33 B.W.C.C. 1.

P. 510. CAULFIELD *v.* PICKUP, LTD. In l.7 of the headnote, after supported, insert : at this point.

P. 513. l.1 read : sect. 49 or 50.

l.C.5 read : sect. 102 (8), and in the following line read : liability for a breach.

l.H.3, for sect. 4, read : subsect. (4).

P. 514. l.G.4, read : I am not satisfied that . . .

P. 515. At end of third line of last paragraph read : sect. 102 (8).

P. 517. CUMPER *v.* POTHECARY. Cases referred to (3) : read [1941] 1 K.B. 1.

P. 650. The solicitor for the defendants was *Herbert Smith.*

P. 677. R. *v.* COMPTROLLER-GENERAL OF PATENTS, *Ex p.* BAYER PRODUCTS, LTD. In the last line of the first part of the headnote, read : " It was contended that the regulation so made was *ultra vires*," substituting *contended* for *held*.

Printed by R. J. ACFORD, LTD., Little London, Chichester, Sussex.

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

HALL *v.* KINGSTON AND ST. ANDREW CORPORATION.

[PRIVY COUNCIL (Viscount Sankey, Lord Atkin and Luxmoore, L.J.), **February 10, 1941.**]

Privy Council—Jamaica—Negligence—Damages for personal injuries—Action improperly constituted—Notice—Action barred by lapse of time—Public Health Law, 1925, *ss.* 22 (2) (*a*), 89 (1), (2)—*Kingston and St. Andrew Corporation Law,* 1931, *s.* 223.

On Nov. 13, 1934, the appellant, who was then about 7 years old, acting by her father as her next friend, sued the respondents for damages for personal injuries. It was alleged that the injuries were caused on June 15, 1934, by the negligent driving by an employee of the respondents of a cart, one of the wheels of which passed over and crushed the appellant's foot. The respondents denied that any injury was caused by the cart, because no part of it ever came in contact with the appellant. The respondents also alleged that the cart in question was being driven on behalf of the council of the corporation under and in obedience to, and in execution of, duties imposed on the council by the Jamaica Public Health Law, 1925, s. 22 (2) (*a*), and that the cart was the property of the council and the driver was the servant of the council. The respondents consequently claimed that the action was improperly constituted, and that the council of the corporation, and not the corporation, was the proper defendant. The respondents further claimed that, if the action was maintainable, they were acting pursuant to, and in execution of, the duties created by the Public Health Law, 1925, s. 22 (2) (*a*), and that the action was barred by the provisions of sect. 89 (1), (2), of that law, in that no proper notice of action was given, the amount of damages claimed was not specified and the action was not commenced within 3 months after the alleged accident. The appellants contended (i) that the question of the ownership of the cart and the uses to which it was put and whether it belonged to the corporation or to the council of the corporation was a mere technicality, as the council of the corporation is part of the corporation, and the corporation is liable for its servants and agents, and (ii) that the action was properly instituted in accordance with the provision of the Kingston and St. Andrew Corporation Law, 1931, s. 223 :—

HELD : (i) the Public Health Law, 1925, s. 89, had no application to the corporation as such, but applied only to actions against individual members or officers of the corporation. The Court of Appeal was in error in holding that the action was barred by that section.

(ii) the cart was the property of the corporation, and its driver was the servant of the corporation, and the cart in question was being driven in circumstances which rendered the corporation, and not the council of the corporation, liable for the injury caused by the negligence of their servant.

(iii) the Kingston and St. Andrew Corporation Law, 1931, s. 223, did not afford any protection to the corporation, because there had been no disregard of any of its provisions.

[**EDITORIAL NOTE.** This case depends upon the proper construction of the Jamaica Public Health Law, 1925, s. 89. The court in Jamaica had held that this section applied to an action brought against the local authority itself, but their Lordships have held that, upon its proper construction, it applies only to actions brought against individual members or officers of a local authority.

As to Protection of Public Authorities, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-293, para. 610; and for Cases, see DIGEST, Vol. 38, pp. 102-106, Nos. 732-760.]

Appeal by special leave from a judgment of the Court of Appeal of Jamaica, dated Oct. 19, 1936, which reversed a judgment of Seton, J., sitting with a jury dated June 19, 1936. The facts are fully set out in the judgment of the court which was delivered by Luxmoore, L.J.

D. N. Pritt, K.C., and *C. J. Colombos* for the appellant.

The respondents did not appear and were not represented.

Luxmoore, L.J.: On Nov. 13, 1934, Olga Hall, who was then about 7 years old, acting by her father as her next friend, sued the Kingston and St. Andrew Corporation (hereinafter called the corporation) for damages for personal injuries. It was alleged that the injuries were caused on June 15, 1934, by the negligent driving by one Mortimer Brown, an employee of the corporation, of a cart marked K.S.A.C. Number 11, one of the wheels of which passed over and crushed the plaintiff's foot. The corporation denied that any injury was caused by the cart, because no part of it ever came in contact with the plaintiff. The corporation also alleged that on June 15, 1934, the cart in question was being driven by Mortimer Brown on behalf of the council of the corporation under and in obedience to, and in execution of, duties imposed on the council by the Jamaica Public Health Law, 1925, s. 22 (2) (*a*), and that the cart was the property of the council and Mortimer Brown was the servant of the council. The corporation consequently claimed that the action was improperly constituted, and that the council of the corporation, and not the corporation, was the proper defendant. The corporation further claimed that, if the action was maintainable, the corporation was acting pursuant to, and in execution of, the duties created by the Public Health Law, 1925, s. 22 (2) (*a*), and that the action was barred by the provisions of sect. 89 (1), (2), of that law, in that no proper notice of action was given, the amount of damages claimed was not specified, and the action was not commenced within 3 months after the alleged accident. The action was tried before Seton, J., sitting with a jury. Five questions were left to the jury, namely (i) Was the plaintiff injured by a cart running over her foot ? If so, (ii) was the cart driven by Mortimer Brown ? If so, (iii) was the injury caused by the negligent driving of the cart ? If so, (iv) was the cart at the time of the accident engaged exclusively in the collection and removal of sweepings, rubbish refuse, night-soil or other waste matter from private premises or public places ? (v) Damages, (i) special, and (ii) general.

The jury answered the first three questions in the affirmative and the fourth question in the negative, and fixed the special damages at £8 19*s*. 6*d*. and the general damages at £300. Accordingly, on June 19, 1936, SETON, J., entered judgment for the plaintiff for £308 19*s*. 6*d*. with costs.

The corporation appealed from this judgment to the Court of Appeal of the Supreme Court of Judicature in Jamaica (hereinafter called the Court of Appeal). The material grounds on which this was based were (i) that the answer in the negative by the jury to question (iv) was against the weight of evidence and perverse, and (ii) that the driver of the cart which was alleged to have occasioned the injuries was at the material time engaged in using the cart to remove rubbish pursuant to, and in performance of, the Public Health Law, 1925, s. 22, and consequently (*a*) the action was brought out of time having regard to sect. 89 (2) of that law, (*b*) the notice of action was bad in that it did not state the amount of damages claimed as required by sect. 89 (1), and (*c*) the corporation was not the proper defendant. The appeal was heard by SIR ROBERT FURNESS, C.J., and SHERLOCK, J. On Oct. 19, 1936, they set aside the jury's answer to question (iv), holding that a negative answer was wholly irreconcilable with the evidence, and substituted for it an answer in the affirmative. The Court of Appeal in the course of its judgment stated as follows :

> In our view, the only inference to be drawn from the answer to question (iv) which we have substituted for that of the jury is that at the time of the accident Brown was using the cart in pursuance of duties imposed by the Public Health Law, 1925. It follows that, whether his employer should properly be said to have been the corporation or should properly be said to have been the council of the corporation, the employer's rights and liabilities are governed by the Public Health Law, 1925.

The Court of Appeal also held that the action was out of time, because, whether the corporation or the council of the corporation was the proper defendant, the requirements of sect. 89 (1), (2) had not been fulfilled. They accordingly set aside the judgment of the court below and entered judgment for the defendant, with costs except the costs of a particular summons in the action which were awarded to the plaintiff and directed to be set off against the general costs of the action. On July 25, 1939, the plaintiff obtained special leave from His Majesty in Council to appeal *in forma pauperis* from the judgment of the Court of Appeal.

The case for the appellant was filed in due course, but no case has been filed on behalf of the corporation, nor did the corporation appear at the hearing of the plaintiff's appeal before their Lordships. Counsel for the plaintiff contended (i) that the Court of Appeal erred in substituting its finding for that of the jury on a pure question of fact, (ii) that the question of the ownership of the cart and the uses to which it was put and whether it belonged to the corporation or to the council of the corporation was a mere technicality, as the council of the corporation is part of the corporation, and the corporation is liable for the acts of its servants and agents, and (iii) that the plaintiff's action was properly instituted in accordance with the provisions of the Kingston and St. Andrew Corporation Law, 1931, s. 223. Their Lordships have considered the note made by Seton, J., of the evidence adduced at the trial with regard to the user of the cart in question at the date when the accident to the plaintiff occurrred. The material evidence with regard to these matters was given by the driver, Mortimer Brown, and by Chief Sanitary Inspector Codling. Mortimer Brown stated in his evidence in chief that he was a cartman. He said :

> I drive a garbage cart. Mr. Codling is my master. He is chief sanitary inspector of St. Andrew. When garbage is collected, I dump it. I drive cart No. 11. I have been doing this work nearly 4 years. I have never done any work but this under Mr. Codling. The cart is specially constructed for rubbish. On Friday, June 15, 1934, I was collecting garbage.

In cross-examination, he said :

> I am still employed by the corporation. Corporation carts are marked K.S.A.C. I still drive No. 11

Codling, the chief sanitary inspector, said in his evidence in chief :

> Brown drives cart No. 11. No. 11 is used solely for sanitary purposes, i.e., picking up household rubbish. It has never been used for any other purpose. On June 15, 1934, I can say cart No. 11 was solely being used for that purpose.

In his cross-examination, he said :

> The corporation pay Brown. They pay me too. This cart [No. 11] is the property of the corporation. The carts are all numbered . . . they are all marked K.S.A.C.

Counsel for the appellant urged that the jury were entitled to ignore the whole of this evidence, because they refused to accept either Brown or Codling as truthful witnesses in their denials that the injuries to the plaintiff were caused by the cart driven by Brown. Their Lordships are unable to accept this argument, and find themselves in complete agreement with the opinion expressed by Sir Robert Furness, C.J., and Sherlock, J., that a negative answer to question (iv) is wholly irreconcilable with the evidence, and they are satisfied that the Court of Appeal had ample jurisdiction to correct the answer to question (iv) in the manner already mentioned.

The Court of Appeal held that it was unnecessary to decide whether the corporation or the council of the corporation was the proper defendant to the action, because the non-compliance by the plaintiff with the requirements of the Public Health Law, 1925, s. 89, afforded a complete answer to the plaintiff's claim. Sect. 89 (1) provides that no action :

> . . . shall be instituted against any member of the central board or any local board or a health officer or any sanitary inspector or any assistant or other employee of the central board or any local board in respect of any act done in pursuance or execution or intended execution of the Public Health Law, 1925, until the expiration of one month's notice in writing of such intended action given by the person complaining to the person concerned specifying the act or injury complained of and the amount of damages claimed therefor.

Sect. 89 (2) provides that any action for anything done in pursuance or execution or intended execution of that law:

> . . . shall be commenced within 3 months after the thing done and not otherwise or in the case of a continuous injury or damages within 6 months next ensuing after the cessation thereof.

Sub-sect. (1) on its true construction appears to their Lordships to afford protection to persons only, and not to bodies corporate or incorporate. The actions in respect of which the required notices are to be given as a condition precedent to their institution are actions against "any member of the central board or any local board." The word "member" is qualified in each case by the reference to the central board and also to the local board. Further, the notice required is to be given to the person concerned. The central board is incorporated under the name of the central board of health by the Public Health Law, 1925, s. 3. By sect. 7 of the same law it is provided that the council of the Kingston and St. Andrew Corporation shall be the local board for the parishes of Kingston and St. Andrew, while in other parishes the parochial boards of such parishes are to be the local boards. Sect. 22 provides, so far as is material to be stated, that every local board shall provide and maintain an efficient service of sanitary carts and scavengers for the collection and removal of sweepings, rubbish, refuse, night-soil and other waste matter from private and public places. At all material times the council of the Kingston and St. Andrew Corporation was not a corporation, nor is it now incorporated. It was at all material times a body set up by the Kingston and St. Andrew Corporation Law, 1931. By sect. 4 (1) of this law the inhabitants of the parish of Kingston and the parish of St. Andrew are declared to be a municipal corporation bearing the corporate name of the Kingston and St. Andrew Corporation, and by such name is given perpetual succession. By sect. 9 (1) of the same law, it was provided that the corporation should be capable of acting by the council, and that the council should exercise all powers vested in the corporation or the council by this law or otherwise. Subsect. (2) provided that the council should consist of the mayor, aldermen and councillors. By a *fasciculus* of clauses contained in Part VII of the same law under the heading "Rates," and numbered 107-111 inclusive, it was provided that rates should be raised, levied, collected and paid to the council, and paid over to the town clerk for the purposes of the corporation. By sect. 192, the funds or money belonging to, or payable to, or collected by, the council under and by virtue of this or any other law should, after due provision had been made, with the approval of the governor in Privy Council, for interest and sinking fund on any loans for which the council was liable or responsible under this or any law, be applicable towards payment of (*i*) the disposal and destruction of street and house refuse and rubbish, (*j*) the maintenance and preservation of all corporate property, (*k*) the payment of any sums payable by the council under any judgment of any court of law, and (*l*) generally towards the payment of all expenses of and incidental to the carrying out of the provisions of this law and of all works and matters incidental thereto.

Sect. 223 provides as follows:

> . . . all actions and proceedings to be commenced against the corporation or any person or persons for anything done in pursuance or intended pursuance of this law shall be commenced within 6 months after the act committed and not otherwise and notice in writing of such action or proceedings and of the cause thereof shall be given to the council member or person against whom it is intended to bring such action or proceedings one calendar month at least before the commencement thereof. A

For the reasons already stated, their Lordships are of opinion that sect. 89 has no application to the corporation as such, and that the Court of Appeal was in error in holding that the action was barred by that B section, although admittedly no notice in accordance with its requirements was given on behalf of the plaintiff before this action was instituted, and the writ was issued more than three months after the date when the injuries were inflicted. Further, their Lordships are satisfied that the evidence proves conclusively that the cart K.S.A.C. No. 11 was the C property of the corporation, and that its driver, Mortimer Brown, was the servant of the corporation, and that the cart in question was being driven when the accident occurred in circumstances which rendered the corporation, and not the council of the corporation, liable for the injury caused by the negligence of their servant Brown. The Kingston and St. Andrew D Corporation Law, 1931 s. 223, does not afford any protection to the corporation, because there has been no disregard of any of its provisions. For these reasons, their Lordships are of opinion that the plaintiff is entitled to recover the £308 19*s*. 6*d*. awarded to her by the jury, and for which judgment was entered in her favour by Seton, J. They have E therefore humbly advised His Majesty in Council that this appeal should be allowed with the costs of the appeal to the Court of Appeal, that the judgment of Seton, J., should be restored, and that such costs of this appeal as are proper to be awarded to the plaintiff suing *in forma pauperis* should be ordered to be paid to her by the respondent corporation. F

Appeal allowed with costs.

Solicitors: *Hy. S. L. Polak & Co.* (for the appellant).

[*Reported by* Hubert B. Figg, Esq., *Barrister-at-Law.*]

DONCASTER AMALGAMATED COLLIERIES, LTD. *v.* LEECH.

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.), **April 3, 1941.**]

Workmen's Compensation—Amount of compensation—Partial incapacity—Amount workman is earning or is able to earn—Workman voluntarily joining the Army—Inclusion of allowances and of family allowance paid direct to wife—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 9 (3).

The employee of a colliery company met with an accident in 1938 and received a weekly sum as workmen's compensation. While he was still partially incapacitated, he voluntarily joined the Army. On Sept. 26, 1940, the company applied for a review, claiming that the compensation should be terminated or reduced on the ground that his pay and allowances in the army came to more than his former earnings on which his compensation was calculated :—

HELD : the allowances to which the workman as a serving soldier was entitled under the Army pay regulations by way of family allowance payable directly to his wife and the money value to him of his uniform, food and lodging were all " earnings " within the meaning of the Workmen's Compensation Act, 1925.

[**EDITORIAL NOTE.** In calculating the average weekly earnings, it is necessary to include in the calculation what the workman receives in kind as well as what he receives in actual money. Here there is also the question of the inclusion of benefit paid directly to the wife of the workman, and it is held, following the decision in *Port of London Authority* v. *Gray* (2), that the sum paid to the wife is also to be included in the calculation of the average weekly earnings.

AS TO AVERAGE WEEKLY EARNINGS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 914, 915, para. 1258; and FOR CASES, see DIGEST, Vol. 34, pp. 416-420, Nos. 3378-3411. See also WILLIS'S WORKMEN'S COMPENSATION, 33rd Edn., pp. 298-304.]

Cases referred to :

(1) *Dothie* v. *Macandrew (Robert) & Co.*, [1908] 1 K.B. 803 ; 34 Digest 254, *2176* ; 77 L.J.K.B. 388 ; 98 L.T. 495 ; 1 B.W.C.C. 308.

(2) *Port of London Authority* v. *Gray*, [1919] 1 K.B. 65 ; 34 Digest 417, *3384* ; 88 L.J.K.B. 107 ; 120 L.T. 11 ; 11 B.W.C.C. 206.

APPEAL by the employers from an award of His Honour JUDGE HILDYARD sitting at the Doncaster County Court, dated Dec. 2, 1940. The facts are fully set out in the judgment of SCOTT, L.J.

G. R. Blanco White, K.C., and *F. W. Beney* for the appellants.

J. D. Casswell, K.C., and *Myles Archibald* for the respondent.

SCOTT, L.J. : This appeal raises a point which has to some extent been considered before by the Court of Appeal, but which is one of some general importance. The appeal is by the employers of a man who was injured on Feb. 20, 1938. He was then earning £3 12*s*. per week on the average within the meaning of the Act. At a subsequent date, the compensation was reduced, on a review, to 20*s*. per week, and subsequently to 11*s*. 3*d*. per week. That reduction was made on the footing that his potential earnings were £2 9*s*. 6*d*., which, deducted from the £3 12*s*., left £1 2*s*. 6*d*., fifty per cent of which was 11*s*. 3*d*., that being the amount to which he would be entitled under the provisions of the Workmen's Compensation Act, 1925, s. 9 (3).

On an application to review and terminate on the ground that the partial incapacity from which the man had been suffering had come to an end, and further, in the alternative, for a reduction on the ground that his earning power was more than £2 9*s*. 6*d*., the county court judge A held that the partial incapacity was still continuing, but held, on the second issue, that the man's earnings were still less than the standard rate under sect. 9 (3), in his particular case less than £2 9*s*. 6*d*. In the meantime, before the date of the application, which was Sept. 26, 1940, the man had voluntarily enlisted in the Army, and had become B a corporal. Under the Army pay order, he was entitled, in addition to his pay, to a separation allowance, which applied to soldiers separated from their wives by the exigencies of service. No married quarters having been assigned to him, he was living separate from his wife, and was thus entitled to a family allowance upon that basis. The figures C affecting his new position were these. His ordinary pay was £1 4*s*. 6*d*., of which he had to allot to his wife 14*s*. as a compulsory allotment. He received rations, washing, uniform, etc., and those were estimated to be of the value to him of 16*s*. per week, making, with his £1 4*s*. 6*d*. pay, the sum of £2 0*s*. 6*d*. Then the family allowance to which he was entitled D was 18*s*., which, added to the £2 0*s*. 6*d*., would make £2 18*s*. 6*d*., which is substantially more than the £2 9*s*. 6*d*. upon which his compensation of 11*s*. 3*d*. had been based. For some reason which I am not able to follow, the county court judge assessed his interest in the 18*s*. allowance as being worth only 9*s*. The argument addressed to us, and, I take it, E to the county court judge, was that the family allowance of 18*s*. was not earnings within the meaning of the Act at all, and ought to be wholly disregarded. If that argument were right, the county court judge ought not to have assessed it at 9*s*., and should have wholly disregarded it. F

Before this court, the argument of counsel for the appellants, is that the whole of the 18*s*. ought to be taken into account as part of the average weekly amount which the workman "is earning or is able to earn in some suitable employment or business after the accident." Those are the words in sect. 9 (3) (i). In my opinion, that argument is well- G founded. The words which I have just read show that the earnings may be under any contract from any source, and are not in any way limited to ordinary contractual wages in an employment by an ordinary employer. The words, in my view, are intentionally meant to include the earnings in fact. The question is, therefore, whether the family H allowance which is given to a married soldier whose wife is living separate from him by reason of the exigencies of service is an earning within the meaning of the Workmen's Compensation Act, 1925, s. 9 (3).

It was said by counsel for the workman that there is a distinction in the Royal Pay Warrant between pay and family allowances. That may well be, but the fact that that distinction is made in the language of the Army Pay Warrant is *nihil ad rem* in considering whether or not the money to which the serving soldier has a title is an earning within the meaning of the Workmen's Compensation Act, 1925. The argument addressed to us was based partly on the wording of the two special Army orders, one dated Apr. 25, 1938, and the other dated Oct. 29, 1940, being supplemental to the main order of 1938. That order is a Royal Warrant entitled : "Family Allowances for Soldiers." It recites as follows :

> Whereas provision is made by the King's Regulations . . . for the issue of marriage allowance to soldiers and their families and for the allotment of married soldiers' quarters or the issue of lodging, fuel and light allowances in lieu . . .

Then the scheme is scheduled to the warrant, and provides by para. 1 of the schedule as follows :

> With effect from Apr. 30, 1938, soldiers serving with the Colours on normal attestations whose pay is issuable from Army funds at rates provided for in the Pay Warrant, 1931 . . . and who have reached the age of 26 years, will become eligible, if qualified as provided in these instructions, for admission to a "married establishment" which will replace the existing married quarters roll and marriage allowance roll.

Para. 6 provides as follows :

> Soldiers on the married establishment referred to in para. 1 above will be eligible, subject to the detailed rules and exceptions stated below, for the following benefits in respect of their families : (1) A family allowance, which will supersede the present marriage allowance and married rates of lodging, fuel and light allowances . . .

At the end of para. 6 there is this sentence :

> The eligibility of individual members of the families of soldiers on the married establishment for the benefits under (ii) (a) and (b) and (iii) above will be determined according to the regulations at present governing the eligibility of members of the family of soldiers on the married quarters roll.

Para. 10 provides as follows :

> When a soldier on the married establishment is separated from his family in circumstances which, under present regulations, confer on a soldier on the married quarters roll an entitlement to accommodation for himself as a single soldier . . . he will, under the new provisions, be entitled to accommodation . . . and to family allowance in respect of his family.

Para. 11 deals with the details of his entitlement, and provides for his receiving the family allowance. The warrant of 1940 deals with rates, but I do not think that it adds to the effect of the warrant which I have read.

The question under those warrants is whether or not the serving soldier who is entitled to a family allowance is a person who, within the meaning of the Workmen's Compensation Act, 1925, is earning the amount of money represented by the allowance in addition to his pay and the equivalent in kind of pay in the form of fuel, lodging, etc. To my mind the answer is obvious. He is entitled to it, and does earn it, and none the less so because he is compelled to assent to the condition upon which he earns it—namely, that it shall be paid direct to his wife. There is no difference, in my view, between the family allowance which is paid *en bloc* and the portion of his pay (in this case, 14*s.*) which he is obliged to allot to his wife. Apart from any authority, I should have come to that conclusion on the simple wording of the pay warrants in the light of the section of the Act which I have cited.

However, we were referred to two cases, to which I will refer very shortly. One was *Dothie* v. *Macandrew (Robert) & Co.* (1), the case of a captain of a ship trading on short sea trade from London who was killed as the result of an accident. His pay was £216 per annum, and, in addition, there were certain emoluments in kind, food and washing, whilst he was on board the ship. It was said that, when the emoluments were valued, they would take his pay above the figure of £250 per annum, which at that time was the limiting figure for eligibility to workmen's compensation under the Workmen's Compensation Act, 1906. The judge held that his remuneration did not come above £250, because those extras should be disregarded. The Court of Appeal pointed out that the judge was wrong and had misdirected himself, and that the test ought to have been, not what the captain saved by receiving food, etc., which was the measure applied by the judge, but the actual worth to him of the food etc. supplied by the employers. Taking the broad view, all that he got in kind was just as much part of his earnings and remuneration as his cash receipts.

The other case referred to was *Port of London Authority* v. *Gray* (2), in which this court decided that allowances comparable to the allowance of the workman in the present case constituted a part of his weekly earnings. In my view, that decision is a decision which covers the present case, and would bind us so to hold, even if we had a different view of our own. I think that it can be summed up in a sentence of Duke, L.J., at p. 77:

> It seems to me to follow that the gains of a voluntarily enlisted private soldier in the present case were earnings . . .

I think that that really is the whole point. One takes into account everything to which the workman is entitled, whether it is in cash or in kind, in order to arrive at a figure of earnings, which has to be taken into account, either as actual earnings or as potential earnings, for the purpose of the calculations in the case of partial incapacity under sect. 9 (3) (i).

The appeal must be allowed, with costs here and below.

MacKinnon, L.J.: I agree. The question of principle raised here is indistinguishable from that which was argued in *Port of London Authority* v. *Gray* (2). That case, to my mind, is an exact and complete authority, which determines this case, and an authority which was for some reason disregarded by the county court judge below. Counsel for the respondent has made an heroic effort to distinguish that case solely on the ground that Duke, L.J., is made to say "the cash equivalent" of that amount. The cash equivalent of 15*s*. or 18*s*. is 15*s*. or 18*s*. I am quite satisfied that Duke, L.J., did not mean to say "the equivalent," or that by a slip of the tongue he was led to say "equivalent," because he had just said that "the valuation of the rations is agreed." He meant to say that the cash separation allowance was agreed. If that be so, the sole ground upon which it is sought to distinguish that case disappears. It is a clear authority which covers this case.

Luxmoore, L.J.: I agree. This case is entirely covered by the authority of the decision of this court in *Port of London Authority* v. *Gray* (2).

Appeal allowed with costs in both courts.

Solicitors: *Johnson, Weatherall, Sturt & Hardy*, agents for *Parker, Rhodes, Cockburn & Co.*, Rotherham (for the appellants); *Corbin, Greener & Cook*, agents for *Raley & Sons*, Barnsley (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

LANCASTER MOTOR CO. (LONDON), LTD. *v.* BREMITH, LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **April 1, 1941.**]

Execution—Garnishee order—Banking account—Debt owing by company—Account in name of liquidator—Whether account attachable.

A company in liquidation took unsuccessful proceedings against the appellants and were ordered to pay the costs. The appellants sought to recover the costs by garnishee proceedings in respect of money in a bank, the account being in the name of the liquidator. The bank paid the money into court:—

Held: the money in the hands of the bank was not owing to the company, but to the liquidator, and the judgment creditors were not entitled to attach it.

[**EDITORIAL NOTE.** The Court of Appeal has here rejected the argument that a liquidator is so closely associated with the company that an account at a bank standing in his name is, for the purposes of garnishee proceedings, in the same position as one standing in the name of the company. This argument seems to have been accepted in *Gerard* v. *Worth of Paris, Ltd.* (1); but, as Sir Wilfrid Greene, M.R., suggests, it is probable that in that case the attention of the court was directed more to questions of priority than to the position of an account standing in the name of the liquidator. However that may be, the court has definitely departed from that decision, so far as it decided that creditors of the company could attach an account standing in the name of the liquidator.

As to what Debts may be Attached, see HALSBURY, Hailsham Edn., Vol. 14, pp. 107-112, paras. 171-176; and for Cases, see DIGEST, Vol. 3, pp. 176, 177, Nos. 316-321.]

Cases referred to:

(1) *Gerard* v. *Worth of Paris, Ltd.*, [1936] 2 All E.R. 905; Digest Supp.

(2) *Hirschorn* v. *Evans*, [1938] 2 K.B. 801; [1938] 3 All E.R. 491; Digest Supp.; 107 L.J.K.B. 756; 159 L.T. 405.

(3) *Re Pacific Coast Syndicate, Ltd.*, [1913] 2 Ch. 26; 10 Digest 1001, *6955*; 108 L.T. 823; *sub nom. Re Pacific Coast Syndicate, Ltd., Ex p. British Columbian Fisheries, Ltd.*, 82 L.J.Ch. 404.

(4) *Klauber* v. *Weill* (1901), 17 T.L.R. 344; 10 Digest 1013, *7037*.

(5) *Plunkett* v. *Barclays Bank, Ltd.*, [1936] 2 K.B. 107; [1936] 1 All E.R. 653; Digest Supp.; 105 L.J.K.B. 379; 154 L.T. 465.

APPEAL by judgment creditors against a judgment of His Honour JUDGE RALPH THOMAS in the Mayor's and City of London Court, dated Feb. 21, 1941. The facts are set out in the judgment of SIR WILFRID GREENE, M.R.

R. S. S. Lane Mitchell for the appellants.

T. J. F. Hobley for the respondents.

Mitchell: The question at issue is whether or not a judgment creditor is entitled to obtain a garnishee order in relation to the liquidator's account at the bank, the judgment being against the company. An action was brought by the company against the appellants. The action failed and the appellants endeavoured to recover their costs by means of taking garnishee proceedings. In the present appeal, I rely upon *Gerard* v. *Worth of Paris, Ltd.* (1), taken in conjunction with *Re Pacific Coast Syndicate, Ltd.* (3). The appellants are entitled to recover against the garnishees. They also have priority over all other creditors. [Counsel referred to *Klauber* v. *Weill* (4) and *Plunkett* v. *Barclays Bank, Ltd.* (5).]

Counsel for the respondents was not called upon.

SIR WILFRID GREENE, M.R.: This is an appeal by judgment creditors against a judgment of His Honour JUDGE RALPH THOMAS, sitting in the Mayor's and City of London Court, whereby he held that the judgment creditors were not entitled to recover the sum claimed against the garnishees. The garnishees are bankers who have paid the money into court. On the evidence as it stood before the judge, the account at the bank stood in the name of Henry Charles Treevy as liquidator of Bremith, Ltd., the company which had brought the unsuccessful action as a result of which the judgment creditors now seek to attach the debt owing by the bank. Speaking quite apart from authority, I should have thought that the application was quite hopeless. Under R.S.C., Ord. 45, r. 1, a garnishee order *nisi* can be made on an affidavit that any other person is indebted to the judgment debtor, and the order will be that all debts owing or accruing from such third person to such debtor shall be attached to answer the judgment or order. Here the money was not owing to the judgment debtor at all. The judgment debtor was the company, and the account was in the name of the liquidator. The liquidator alone could sue the bank, and his cheque alone would be honoured. A cheque signed on behalf of the company would not be

honoured by the bank, and there was no relationship of banker and customer or debtor and creditor between the bank and the company. I should have thought, as I say, that the application was one which could not succeed. However, counsel for the appellants quite properly refers us to the decision of this court in *Gerard* v. *Worth of Paris, Ltd.* (1).
A That was a case where a company went into voluntary liquidation. It was a members' liquidation, and not a creditors' liquidation. The liquidator discharged the manageress, who sued the company for wrongful dismissal and obtained judgment in default of defence. She then applied for a garnishee order on a bank account in the name of the liquidator. There
B was no evidence of any other claims on the company. The master refused to make the order absolute, but the judge in chambers reversed his decision. There were several points argued in the case, but the point on which the parties appeared to be anxious to have a decision was the question of the priority of the claimant's debt. So far as the report shows, no ar-
C gument was addressed to the court upon the question whether or not, in view of the fact that the account was in the name of the liquidator, a garnishee order could properly be made. I cannot help thinking, in reading the report, that that point was deliberately passed *sub silentio* by counsel, in order that the point of substance might be decided.
D Nevertheless, it is fair to say that the point had to be decided by the court before it could make the order which it did, because it had to decide whether the order of the judge should stand or the order of the master should be restored. There were two members of the court sitting, SLESSER and ROMER, L.JJ., and the only passage in the judgment,
E which was the judgment of SLESSER, L.J. (ROMER, L.J., not delivering an independent judgment), is to the following effect, at p. 909:

> The master appears to have taken the view that, in so far as the debt was owing to the company and the account was in the name of the liquidator, there was a difficulty in proceeding by garnishee order.
>
> F In my view, the learned master, if that was his view, was mistaken. If all other requirements were satisfied and the lady was entitled to garnishee that account of the company, the mere fact that it stood in the name of the liquidator does not seem to me to effect any difference in her rights.

With all respect to SLESSER, L.J., who delivered that judgment, and to ROMER, L.J., who agreed with it, I cannot consider, myself, that this
G court sitting here is bound to follow it. It was a judgment delivered without argument and delivered without reference to the crucial words of the rule, and without any citation of authority. As I say, I cannot help thinking that the court was induced to say what it did about it because counsel had not really desired to argue the point on either side.
H With all respect again, I can look upon those observations only as observations which cannot be treated as a binding authority upon this court Accordingly, I do not propose to follow them, because it seems to me that they are wrong in principle, and are not to be justified when the language of the rule and the ordinary principles which govern the relationship of banker and customer are considered. It is worth noticing that in a

later case, *Hirschorn* v. *Evans* (2), Slesser, L.J., delivered a judgment, as one of the majority consisting of himself and MacKinnon, L.J., the reasoning of which appears to me to be quite inconsistent with the previous decision to which he had been a party in *Gerard* v. *Worth of Paris, Ltd.* (1). *Hirschorn* v. *Evans* (2) was a case where a husband and wife had a bank account in their joint names, and it was held by Slesser and MacKinnon, L.J., (Greer, L.J., dissenting), that: A

> . . . inasmuch as the debt which the bank owed was not a debt due to the husband alone but to him jointly with his wife, it could not be attached to answer the judgment against the husband.

That seems to me, if I may say so, to be in accordance with principle in these matters. The crucial matter to be observed is the relationship of the alleged debtor to the judgment debtor. That relationship must be one of debtor and creditor, and, unless it falls within that description, the rule does not apply. That aspect of the matter was fully gone into by Slesser, L.J., and MacKinnon, L.J., did not dissent from that view. In fact, he took the same view himself. In those circumstances, I feel that I am justified in the course, which I propose to take, of saying that, in my opinion, this appeal as it stands must be dismissed. B C

Clauson, L.J.: I agree, for the same reasons as those which have been given by Sir Wilfrid Greene, M.R. D

Goddard, L.J.: I agree. I only want to say that, in *Hirschorn* v. *Evans* (2), to which Sir Wilfrid Greene, M.R., has referred, there was a dissenting judgment of Greer, L.J., but I do not think that he dissented in any way on the point of principle which we have to decide here. The only ground of dissent was in the peculiar circumstances of that case, in that there was an arrangement by which either the husband or the wife could draw cheques, and he thought that that circumstance justified garnishee proceedings in respect of the husband's debt. His judgment in no way affected the rule which we are affirming, and which in fact was affirmed by *Hirschorn* v. *Evans* (2), which was subsequent in date to *Gerard* v. *Worth of Paris, Ltd.* (1). E F

Appeal dismissed.

Solicitors: *J. Hampson Fogg* (for the appellants); *J. E. Baring & Co.* (for the respondents). G

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

JOHN BARKER & CO., LTD. *v.* LITTMAN.

[CHANCERY DIVISION (Bennett, J.), **April 4, 1941.**]

Emergency Legislation—Order for specific performance—Failure of purchaser to obey order—Application by vendors to forfeit deposit—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (1).

The defendant having failed to complete an agreement to purchase certain freehold property, the plaintiffs obtained judgment in an action for specific performance. On the defendant's failure to comply with the judgment, the plaintiffs issued a summons under the Courts (Emergency Powers) Act, 1939, for its enforcement, but they did not think it worth their while to continue those proceedings, and subsequently they brought a motion asking for rescission of the contract and forfeiture of the deposit. The defendant contended that this relief should not be granted as of right, but was a matter for the discretion of the court, for which it was necessary to obtain leave under the Courts (Emergency Powers) Act, 1939. Such leave would have been necessary if no proceedings for specific performance had been instituted :—

HELD : before the passing of the Courts (Emergency Powers) Act, 1939, the court had no discretion as to the granting of the relief sought, but had to accede to it as of right. That Act did not alter the position in this case ; and, although the plaintiffs would require leave under that Act to enforce the judgment for specific performance, they were entitled as of right to an order for rescission of the contract and forfeiture of the deposit.

[**EDITORIAL NOTE.** In this case the judge has held himself bound by his decision in *Broadstairs Picture House, Ltd.* v. *Littman* (3) to decide that this is a case where the matter is not within the Emergency Legislation. It was argued, however, that, quite apart from the Emergency Legislation, the court had a discretion whether or not it would make an order rescinding the contract and forfeiting the deposit, but it is held that such an order, in the circumstances of this case, can be obtained as of right.

AS TO THE COURTS (EMERGENCY POWERS) ACT, 1939, s. 1 (1), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 947 ; and BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, p. 206.]

Cases referred to :

(1) *Hall* v. *Burnell,* [1911] 2 Ch. 551 ; 40 Digest 228, *1985 ;* 81 L.J.Ch. 46 ; 105 L.T. 409.

(2) *Holford* v. *Trim* (1921), 65 Sol. Jo. 768 ; 40 Digest 229, *1989.*

(3) *Broadstairs Picture House, Ltd.* v. *Littman,* [1940] Ch. 860 ; [1940] 3 All E.R. 419 ; Digest Supp.

MOTION asking for rescission of an agreement dated Aug. 8, 1939, and for forfeiture of deposit. The facts are fully set out in the judgment.

Lindsay M. Jopling for the plaintiffs.
E. J. Heckscher for the defendant.

BENNETT, J. : This is a motion by the plaintiffs in a specific performance action, for an order rescinding an agreement, dated Aug. 8, 1939, whereby the defendant contracted to buy certain freehold property from the plaintiffs, an order that the defendant's deposit of £650 be forfeited to the plaintiffs, a declaration that the plaintiffs could give a discharge for the deposit money now in the hands of Baileys, Shaw & Gillett as stakeholders, and an order for the payment by the defendant to the plaintiffs of the costs of the action, of the costs of this motion and of the costs of certain proceedings taken by the plaintiffs under the Courts (Emergency Powers) Act, 1939.

It appears from the affidavit in support of the motion that, under the contract for sale, the date fixed for completion was Sept. 29, 1939, that the defendant failed to complete his purchase in accordance with the agreement, and that on Jan. 24, 1940, the writ in the action asking for specific performance of the agreement was issued. In that action, the plaintiffs applied for summary judgment under the provisions of R.S.C., Ord. 14A, and on Apr. 29, 1940, on that application, an order was made for specific performance and for the usual accounts to be taken for the purpose of ascertaining what was due from the defendant to the plaintiffs for the purchase money and for the costs of the action. By that order, it was also provided that, upon the plaintiffs executing a proper transfer or transfers of the hereditaments and premises contracted to be sold to the defendant, such transfer to be settled by the judge if not agreed, the defendant should pay to the plaintiffs the balance certified to be due to them. In due course, a certificate was made, and the certificate was filed on Sept. 27, 1940. It was certified by that certificate that the costs had been fixed at £64 0*s*. 8*d*., that the sum of £12,846 10*s*. 9*d*. remained due to the plaintiff company, and that proper transfers had been agreed between the parties and those transfers were identified and a place and time were appointed for the defendant to pay to the the plaintiffs the sum of £12,846 10*s*. 9*d*. It is proved that, upon the appointed day, the defendant failed to appear at the appointed place. and, because it was thought that his appearance at the appointed place might have been prevented by air raids, two further appointments for completion were given to him, neither of which he attended. The plaintiffs were then in a position to enforce their judgment for specific performance, except that the Courts (Emergency Powers) Act, 1939, was a bar to enforcement of that judgment unless and until they had obtained the leave of the court under the Act to enforce it. On Nov. 20, 1940, therefore, the plaintiffs delivered a summons under the Courts (Emergency Powers) Act, 1939. In answer to that application, the defendant filed evidence, and, after consideration, the plaintiffs concluded that it would not be worth their while—at any rate, at that time—to proceed to enforce the judgment for specific performance, and so they abandoned that application and determined, as I think they were entitled to do, to apply to the court for an order for the rescinding of the contract and for the forfeiture of the deposit which the defendant had paid under it. Before the passing of the Courts (Emergency Powers) Act, 1939, the application was one to which the court must have acceded. It seems to me, from the authorities which have been cited to me, to have been an order to which the plaintiffs were entitled, and in particular I refer to the order of Eve, J., in *Hall* v. *Burnell* (1) which was followed by Russell, J., in *Holford* v. *Trim* (2) in 1921. I have held in *Broadstairs Picture House, Ltd.* v. *Littman* (3) that the plaintiffs, in circumstances similar to those in which the plaintiffs in the present case find themselves, do not need the leave of the court under the Courts (Emergency Powers) Act, 1939, for obtaining such an order as they ask for by their notice of motion. In asking for such an order, the plaintiffs are not seeking to enforce the judgment for specific performance. Counsel for the defendant agrees that this court is bound by the decision in *Broadstairs Picture House, Ltd.* v. *Littman* (1), but argues that, quite apart from the provisions of the Courts (Emergency Powers) Act, 1939, the court has a discretion whether or not it will make the order here asked for, and, in considering whether it should exercise the discretion and make such order, that the court should have regard to the same matters as those to which it would have regard if it were being asked under the Courts (Emergency Powers) Act, 1939, to give the plaintiffs leave to forfeit the deposit. He argues that, under the provisions of sect. 1 (2) (*a*) (iv), if the plaintiffs had not taken any proceedings at all to obtain an order for specific performance or otherwise, they could not have forfeited the deposit without the leave of the court, and that the court would not have made an order entitling them to forfeit the deposit if the defendant had satisfied the court under sect. 1 (4) that he had been unable to perform his contract by reason of circumstances directly or indirectly attributable to the war. He therefore asks me to look at the affidavits which have been filed on behalf of the defendant for the purpose of seeing whether the defendant has proved that he was unable to perform his contract by reason of circumstances directly or indirectly attributable to the war before I make the order which the plaintiffs ask me to make. I am inclined to agree that, if I had a discretion, it would be right for me to take into consideration those matters and facts, but it does not seem to me, looking at the current of authorities to which my attention has been called, that the case is one in which the plaintiffs do come to the court and ask the court to exercise its discretion. The cases seem to me to show that the order which the plaintiffs ask is an order to which they are absolutely entitled, and in respect of which I have no discretion to exercise before making it.

For these reasons, in my judgment, counsel for the defendant failed to show that there is any ground upon which I can properly refuse to accede to the plaintiffs' motion. There is only one thing upon which I think the plaintiffs are wrong. They ask me to order the defendant to pay the costs of the proceedings which they initiated under the Courts (Emergency Powers) Act, 1939, for the purpose of getting leave to enforce the judgment for specific performance, which proceedings they afterwards abandoned. I do not think that, in the circumstances, I ought to order the defendant to pay these costs.

Order granted in the terms of the notice of motion. Leave to appeal granted. Defendants to pay all costs except those relating to proceedings under the Courts (Emergency Powers) Act, 1939.

Solicitors: *Baileys, Shaw & Gillett* (for the plaintiffs); *Wigram & Co.* (for the defendant). A

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

FAY *v.* MILLER, WILKINS & CO.

[Court of Appeal (Sir Wilfrid Greene, M.R., Clauson and du Parcq, L.JJ.), **March 27, 28, April 8, 1941.**]

Auctioneers—Reserve price—Sale for less amount—Warranty of authority—Memorandum of sale signed and deposit accepted. D

Sale of Land—Memorandum of contract—Description of parties—Incorporation of condition of sale—" Vendor will convey as personal representative."

A firm of auctioneers received instructions to offer a house for sale by private treaty, the reserve price to be £750. They failed to find E a purchaser and later received instructions to include the property in one of their auction sales. The vendor was the personal representative of the deceased owner, and her instructions were that there should be a reserve price of £750, but the auctioneers were under a misapprehension that the instructions were for the reserve price to be £600. The conditions of sale reserved to the vendor the right to fix a reserve price and also stated that the vendor would convey as personal F representative. The auction duly took place and the property was knocked down to the purchaser upon her bid of £600. The auctioneers thereupon signed a memorandum of the contract, but the space in which the vendor's name should have been inserted was left blank. The memorandum, however, incorporated the conditions of sale. The vendor subsequently repudiated the contract and the purchaser sued G both the vendor and the auctioneers. Against the vendor the purchaser claimed specific performance, but this claim failed since it was held on the facts that the reserve price was £750. Against the auctioneers the purchaser claimed damages for breach of warranty of authority. In answer to this claim the auctioneers contended that there was no sufficient memorandum of the contract within the Law of Property Act, 1925, s. 40, and that the sale was within their ostensible authority :— H

Held : (i) the description of the vendor as personal representative, incorporated by reference to the conditions of sale, was a sufficient description of the vendor to satisfy the Law of Property Act, 1925, s. 40.

(ii) by signing the memorandum after the sale, the auctioneers impliedly warranted that they had authority to sell the house at the price named, and were, therefore, liable to the purchaser for breach of warranty of authority.

[**EDITORIAL NOTE.** The important contention in this case is the one impeaching the sufficiency of the memorandum. It has been held in earlier cases that " mortgagee " and " trustee for sale " are sufficient descriptions within the section, because the persons answering those descriptions with regard to the subject-matter of the proposed sale can be identified quite apart from the existence of the contract. This principle was, in *Towle* v. *Topham* (1877) 37 L.T. 308 ; 12 Digest 147, *1004*, extended to a person contracting as the personal representative of a named person, where the contract was made before a grant had been obtained. Here there was just the usual clause in the conditions stating that the conveyance would be made by the vendor as personal representative. It is undoubtedly true that such a clause is inserted solely with a view to the insertion in the conveyance of words restricting the covenants for title and is not in any way intended as a description of the vendor, but, as is well-known, the authorities on this point have proceeded rather on the principle that the statutory requirement is " a weapon of defence, not offence," and, in some cases, a wide construction of the terms of the statute has been adopted. It may perhaps be pointed out that, in *Re Spencer and Hauser's Contract*, [1928] Ch. 598, at p. 608, TOMLIN, J. decided that " a contract containing a clause indicating how the title is proposed to be made is indicative only of the vendor's intention and is not a warranty to make a good title in the particular form that is mentioned." Upon that view, it would seem that the clause relied upon in this case did not amount to a binding statement that the vendor was, or, indeed, ever would be, the personal representative of anyone, and it may be that there is a conflict between the two decisions.

AS TO SUFFICIENCY OF MEMORANDUM, see HALSBURY, Hailsham Edn., Vol. 7, pp. 118-120, paras. 166-169 ; and FOR CASES see DIGEST, Vol. 12, pp. 143-148, Nos. 968-1014.]

Cases referred to :

(1) *Hood* v. *Barrington* (*Lord*) (1868), L.R. 6 Eq. 218 ; 12 Digest 146, 995.

(2) *Catling* v. *King* (1877), 5 Ch.D. 660 ; 12 Digest 147, *1003* ; 46 L.J.Ch. 384 ; 36 L.T. 526.

(3) *McManus* v. *Fortescue*, [1907] 2 K.B. 1 ; 3 Digest 5, *20* ; 76 L.J.K.B. 393 ; 96 L.T. 444.

(4) *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124 ; 12 Digest 147, *1002* ; 48 L.J.Ch. 10 ; 39 L.T. 173 ; *revsg.* (1877), 5 Ch.D. 648.

(5) *Potter* v. *Duffield* (1874), L.R. 18 Eq. 4 ; 12 Digest 143, *971* ; 43 L.J.Ch. 472.

(6) *Rainbow* v. *Howkins*, [1904] 2 K.B. 322 ; 3 Digest 4, *16* ; 73 L.J.K.B. 641 ; 91 L.T. 149.

APPEAL by the plaintiff from an order of BENNETT, J., dated Nov. 13, 1940. The facts are fully set out in the judgment of CLAUSON, L.J.

J. Pennycuick (for *Gerald Upjohn* on war service) for the appellant.
Hon. Denys B. Buckley for the respondents.

Pennycuick : The memorandum contained words which identified the vendor by reference. There is no difference in principle between saying that a vendor is a trustee for sale and saying that he is a personal represenive : *Rossiter* v. *Miller* (4). In that case, " proprietor " was held to be sufficient. In *Potter* v. *Duffield* (5), " vendor " was held insufficient. Reliance is placed upon *Catling* v. *King* (2), where " a trustee selling under a trust for sale " was held sufficient. On the authorities, and in principle, the description that " the vendor will convey as personal representative " unequivocably identifies the vendor as the person who will convey as the personal representative of the deceased owner. *McManus* v. *Fortescue* (3) is authority for saying that the auctioneers had no ostensible authority to bind the vendor. The auctioneers not only accepted a bid below the reserve price, but went further and signed a memorandum and accepted a deposit. They thereby warranted that they had authority to sell at the price at which the property was knocked down. The condition applies during the bidding only. [Counsel referred to Halsbury's Laws of England, Hailsham Edn., Vol. 1, p. 300].

Buckley: It is necessary to find in the memorandum a description of the vendor, and it must be a description which actually describes him: *Catling* v. *King* (2). The condition is not a description from which the vendor can be ascertained. It is impossible to say with certainty who the vendor is. A statement that the vendor will convey as personal representative does not amount to a representation that the vendor is seised of the property as personal representative. The vendor might be a beneficiary, a purchaser who has not taken a conveyance, or the personal representative of a mortgagee. He might have entered into the contract upon the assumption that he would obtain a grant of representation before the time for completion arrived. On the facts, the sale was without reserve. The purchase was a conditional one, and the memorandum, therefore, was a memorandum of a conditional purchase. The auctioneers acted within the scope of their ostensible authority, and the contract was good: *Rainbow* v. *Howkins* (6).

Pennycuick, in reply.

Sir Wilfrid Greene, M.R.: In the transactions which led to this litigation there were four parties: (i) the first defendant, Mrs. Hill, (ii) her solicitors, Messrs. Edridges & Drummonds, (iii) the second defendants (the respondents here), Messrs, Miller, Wilkins & Co., and (iv) the plaintiff (the appellant here), Mrs. Fay. For convenience, I will refer to these individuals and firms as the vendor, the vendor's solicitors, the auctioneers and the purchaser respectively.

The first matter which falls for examination is the finding of Bennett, J., that the vendor in effect fixed a reserve price of £750 for the auction sale. Unless this finding stands, the purchaser's claim against the auctioneers must fail. Before I deal with the evidence upon which this finding is based, there are certain considerations affecting the legal relationship of the parties concerned which need to be stated. In the first place, the vendor had no direct dealings with the auctioneers. She left the arrangements for the auction sale in the hands of her solicitors, who accordingly became her agents to employ and instruct the auctioneers. Secondly, the position of the auctioneers was not that of sub-agents responsible only to the plaintiff's solicitors as head agents. It was intended to bring them into direct contractual relationship with the vendor, whose agents they were to be, and the function of the vendor's solicitors as agents for the vendor was to bring this relationship into existence. In other words, the vendor's solicitors were the vendor's agents to make a contract of agency between the vendor and the auctioneers.

Apart from cases of holding out, an agent must act within the limits of his actual authority, express or implied. If he purports to make a contract with a third person on behalf of his principal which exceeds his actual authority, the principal is not bound. This applies, not only to cases where the contract which the agent is to make with the third person is itself the final contract in contemplation, but also to cases where it is itself a contract of agency whereby the third person becomes the agent of the principal to make a contract with a fourth person. If, therefore, the agent, in purporting to make on behalf of his principal a contract of agency between the third person and the principal, exceeds his actual authority, the contract is not binding on the principal, and the relationship of principal and agent between him and the third person is never constituted. It follows from this that, if the third person, purporting to act as agent for the principal, makes a contract with the fourth person on the principal's behalf, the principal is not bound, since the third person never became his agent to make the contract.

It will be seen, therefore, that the crucial matter for examination is the actual authority given by the vendor to her solicitors, since it cannot be suggested on the facts that the vendor held out her solicitors as having any authority to employ the auctioneers to sell subject to any particular reserve or without reserve. Their authority to employ the auctioneers was, moreover, a special authority, and there is no room for any implication of authority over and above the authority expressly conferred upon them. If, therefore, the vendor appointed her solicitors to be her agents to instruct the auctioneers to sell the property by auction subject to a reserve of £750, and if the solicitors instructed the agents to sell subject to a smaller reserve, or without reserve, they were purporting to make a contract of agency between the auctioneers and the vendor which they had no authority to make, and the result was (i) that no agency was ever constituted between the vendor and the auctioneers, and (ii) that the contract with the fourth person, the purchaser, which the auctioneers purported to make on behalf of the vendor, did not bind her.

In considering the evidence relating to the authority given by the vendor to her solicitors, I disregard, as BENNETT, J., appears to have disregarded, the statement, made by the vendor's husband in cross-examination, to the effect that he expressly fixed a reserve price of £750 for the auction in conversation with Marten, a partner in the firm of Messrs. Edridges & Drummonds. This statement is not one upon which reliance can be placed, in view of Hill's own evidence in chief, and in view of the evidence of Marten himself. The relevant instructions, therefore, are confined to those given by the vendor to her solicitors at a time when the property was being offered for sale by private treaty, and the question is whether those instructions must be taken to have applied generally to any sale of the property or to have been limited to a sale by private treaty. If the latter were the true view, it would follow that, when the vendor left for her holiday in Holland shortly before the auction sale without expressly fixing a reserve for that sale, she left matters in a position in which her solicitors, unless they could get into touch with her, had either no authority to give instructions for a sale at all or authority to give instructions for a sale at a reserve fixed by themselves or the auctioneers, or authority to give instructions for a sale without reserve. No one of these alternatives appears to me to be consistent with the action of anyone concerned or with the probabilities of the case. However this may be, the issue must depend on the true meaning and effect of the instructions originally given by the vendor to her solicitors. It is from these instructions that the scope of the authority conferred on the solicitors to employ the auctioneers must be ascertained. I appreciate the force of the argument that, in normal circumstances, one would not expect a limit fixed by a vendor for the purposes of a sale by private treaty to be intended to apply to a subsequent auction after the attempt to find a purchaser at that figure had failed. However, this is a question of intention, and must be answered in the light of the words used and the circumstances of the case. In the present case, the instructions were given to one Wilkins, the managing clerk to the vendor's solicitors. Wilkins retired on June 24, the day after he had written to the auctioneers informing them that the vendor was willing to have the property included in their auction sale in July. I can entertain no doubt that Wilkins understood the instructions originally given to him as applicable to the auction sale, and, if he had not retired, he would have fixed the reserve price at £750 in the absence of further instructions from the vendor. This seems to me to be a reasonable interpretation of the instructions, given obviously with emphasis, and accompanied by the statement by the vendor that, if she could not get £750 for the property, she would rather let it. Bennett, J., so construed the instructions. He saw the witnesses, and was in a better position than we are to give full weight to the phraseology and emphasis employed. I do not think that in any case we should be justified in differing from his conclusion of fact. Having regard to the evidence of the plaintiff and her husband and Wilkins, I think that it is impossible to suppose that, if the solicitors had fixed the reserve at £750, they would have been guilty of a breach of their duty as the vendor's agents.

I come, therefore, to the conclusion that the contract of agency between the vendor and the auctioneers which the vendor's solicitors were authorised to make on the vendor's behalf was one under which the reserve price was to be £750. The contract which the auctioneers purported to make with the purchaser was, accordingly, not binding on the vendor on the ground of any actual authority in the auctioneers, since they never became the vendor's agents to make such a contract. No question of ostensible authority in the auctioneers can arise. Such ostensible authority could exist only if the vendor, acting by herself or through her solicitors authorised in that behalf, had placed the auctioneers in such a position that the purchaser would reasonably suppose them to have authority to sell at the price at which they did. There is no evidence of A this. Moreover, the conditions of sale put the purchaser on inquiry as to the existence of a reserve, and, if she chose to buy without knowing whether or not a reserve had in fact been fixed, the risk was hers.

The next question raises the point upon which BENNETT, J., rejected the purchaser's claim against the auctioneers. He held that there was B no note or memorandum of the contract of purchase sufficient to satisfy the Law of Property Act, 1925, s. 40. The result was, of course, that the purchaser could not show any damage arising from the auctioneers' breach of warranty of authority which the judge appears to have thought was in other respects established. The alleged defect in the memorandum C is the absence of words sufficient to lead to the identification of the vendor. The only words relied on for this purpose are those in cl. 4 of the special conditions of sale: "The vendor will convey as personal representative." BENNETT, J., held that these words were insufficient on the ground that they were inserted, not with the intention of identifying D the vendor, but for the purpose of the conveyance. With all respect to the judge, in my opinion, this is too narrow a view. The question is not as to the intention with which the words were used, but as to what, on a fair construction, they mean. If they are sufficient to lead the inquirer to the actual vendor, that is enough, even though, as in the case of the word E "proprietor," considerable research may be required. The words appear to me to mean, in the first place, that in the conveyance the vendor will convey, and will be expressed to convey, as personal representative of the deceased person, so as to bring into effect the provisions of the Law of Property Act, 1925, s. 76 (1) (F), which limit the vendor's covenants for F title. This necessarily means that, at the date of the conveyance, the vendor will be a person who can properly be described therein as the personal representative of a deceased person, and that he will convey the property sold under that description and in that capacity. It was argued by counsel for the respondents that the language of cl. 4 of the G special conditions of sale implied nothing more than that the vendor's covenants for title would be limited by reference to the covenants implied on a conveyance by a personal representative, and was merely a convenient form of shorthand implying nothing as to the character of the grantor. I cannot accept this argument. There is a well-known con- H veyancing device for achieving the result which he suggests: KEY AND ELPHINSTONE, 13th Edn., Vol. 1, p. 571, No. 8. Such a device is necessary because the limited statutory covenants for title are imported only when the grantor both conveys in the capacity of personal representative and is expressed to convey as such.

However, this does not dispose of the other argument—namely, that cl. 4 of the special conditions of sale describes only the character which the vendor will have at the date of the conveyance, and affords no sufficient clue to his identity at the date of the contract. I do not so regard it. It appears to me that, if the vendor at the date of the conveyance will be the personal representative of a deceased owner, it follows naturally that he must occupy that position at the date of the contract. Any other interpretation would involve the assumption of possibilities too remote to be regarded.

I construe the condition, therefore, as implying that the vendor is selling as legal personal representative of a deceased person. Counsel for the respondents argued that even this would not be enough. It is no doubt difficult to state any logical rule to explain the decisions upon the question of what words are sufficient to identify the vendor, and I do not propose to embark upon any such inquiry. I content myself with observing that in Fry on Specific Performance, 2nd Edn., 1881, p. 148, para. 331, there is quoted with approval a *dictum* of Lord Romilly, M.R., in *Hood* v. *Barrington* (*Lord*) (1) to the effect that it is sufficient if the vendor is described as mortgagee, executor or trustee. This paragraph has appeared in all subsequent editions, and the practice of conveyancers must for many years have been based upon it as a correct statement of the law. It would not be right to disturb a practice so long-standing, and I must decline to do so, particularly as it receives confirmation in the decision of this court in *Catling* v. *King* (2). It is right to say that the passage in Fry on Specific Performance was not before Bennett, J.

The next point taken by counsel for the respondents was based on the decision of this court in *McManus* v. *Fortescue* (3). In that case, the conditions stated that there was a reserve price, and the defendant auctioneers had knocked the property down to the plaintiff at a lower price. It was held that the fall of the hammer was only a conditional acceptance of a conditional offer, the condition being that the offer should not be less than the reserve price. In the present case, however, a memorandum was actually signed by the auctioneers, and it is impossible to treat the condition as applying after that was done. This is not affected by the words in the memorandum by which the vendor acknowledges that she has purchased the property "subject to the accompanying conditions of sale." These words cannot include a condition the operation of which is in its nature confined to the period before a memorandum is signed. The auctioneers are expressed to "ratify" the sale, and this is quite inconsistent with the view that the condition was regarded as remaining in force at that stage. Counsel for the respondents then argued that the signing of the memorandum was a new transaction within the ostensible authority of the auctioneers. When this proposition is analysed, it means nothing more than that the auctioneers had ostensible authority to make representations as to the extent of their own authority, and I cannot accept it. Lastly, counsel for the respondents maintained that, as the conditions only empowered the vendor to fix a reserve price, and the purchaser did not know that a reserve price had been fixed, she was entitled to assume that there was no reserve. The short answer to this is that, as I have already said, the purchaser was put upon inquiry, and, if she chose to bid without knowing whether or not there was a reserve price, the risk was hers, and she could not hold the vendor bound if in fact there was a reserve price which exceeded the amount of her bid. I cannot, therefore, accept any of the arguments which seek to show that the contract was binding on the vendor. It follows admittedly that the auctioneers are liable to the purchaser for damages for breach of an implied warranty of authority, and this appeal must accordingly be allowed. The order will be in accordance with the judgment of Clauson, L.J.

Clauson, L.J.: On July 26, 1939, the respondents, whom I will call the auctioneers, put up for sale by auction, on the instructions of Mrs. Hill (whom I will call the vendor), a house which Mrs. Hill was in a position to sell as being the personal representative of a lady, dead some months before, who owned the house at the time of her death. The conditions of the auction sale reserved to the vendor the right to fix a reserve price. The appellant (whom I will call the purchaser) bid £600 for the house, and the auctioneers knocked it down to her bid, and proceeded to sign a memorandum of the sale of the house by the vendor to the purchaser for £600. The vendor refused to complete. The purchaser sued the vendor for specific performance, adding the auctioneers as defendants, and claiming against them in the event of her failing to obtain specific performance by reason of an inability to establish that the auctioneers had authority to sell the house to her for £600, damages for breach of warranty of authority. The judge dealt first with the question of authority. He held that the evidence showed that the auctioneers had authority to sell only to a bidder of £750 or some higher figure, and, on that ground, he refused to enforce the alleged contract against the vendor. However, he refused to give damages against the auctioneers for breach of warranty, because he held that, by reason of the provisions of the Law of Property Act, 1925, s. 40, there was no enforceable contract in the absence of a signed note of the contract for sale. The note of the contract was said to be insufficient to comply with the relevant section because it failed to record all the essential terms of the contract, in that it contained nothing to identify the vendor. As so often happens in these cases, the record of the contract showed a space in which to insert the vendor's name, but no name had been inserted. It was not disputed before us that, if this objection based on sect. 40 of the Act must be upheld, the judge was right in dismissing the action as against the auctioneers.

The first question which falls for decision is whether the judge correctly decided the question of the insufficiency of the memorandum. It is well-settled that, if the vendor's name does not appear on the face of the contract, the contract will not suffer from insufficiency on that score if it indicates the vendor by a description sufficient to preclude any fair dispute as to identity. It has been held that "proprietor" or "owner" is sufficient description (*per* Lord Cairns in *Rossiter* v. *Miller* (4), at p. 1140), and so also is "executor" or "trustees" (*per* Lord Romilly, M.R., in *Hood* v. *Barrington* (*Lord*) (1)), or "trustees for sale" (*per* Jessell, M.R., and James and Mellish, L.JJ., in *Catling* v. *King* (2)). In my judgment, a description of the vendor as personal representative must, in view of those longstanding authorities, be held sufficient if such a description is to be found in the note, or in the conditions or particulars embodied by reference in the note. In the present case, the memorandum embodies the conditions, and in them appears this clause: "The vendor will convey as personal representative." It was decided by the judge, and was strenuously argued before us, that this clause did not amount to a description of the vendor as personal representative. It was argued that the clause had reference only to the form of the conveyance, and was not nor was it intended to be, a description of the vendor. It was argued that the clause merely stated that the vendor, whoever he was, would not give any covenants for title save those which would be implied under the Law of Property Act, 1925, s. 76 (1) (F), by his being expressed to convey as personal representative. It must be borne in mind, however, that the implication of covenants by a conveyance expressed in that form is effected only if the conveying party is not only expressed so to convey, but in fact does convey as the personal representative of a deceased person. This consideration seems to lead inevitably to the conclusion that this clause indicates to the reader that the vendor is a personal representative, and, if once that conclusion is reached, it seems to me to follow that the requirements of the section as to the vendor's description must be held, on the strength of the authorities which I have mentioned, to be satisfied.

I am accordingly unable to agree that, by reason of sect. 40, the contract was unenforceable. However, it is open to the auctioneers to support the correctness of the dismissal of the action on any other ground, and they strenuously argued that the dismissal was justified by the fact that they had, or must be taken to have had, authority to sell for less than £750. Their counsel asked us to hold (i) that, on the evidence, no reserve was ever fixed by the vendor, (ii) that, assuming this contention to be untenable, the memorandum registered nothing more than a conditional contract to sell if—and only if—it turned out that £600 was not less than the reserve, and (iii) that, in any view of the matter, a sale by the auctioneers at £600—or, indeed, at any other price—was within their ostensible authority, and, therefore, binding on the vendor. In my opinion, the materials before us do not justify us in overruling the decision of the judge, who saw the witnesses, that no authority was ever given to the auctioneers to sell the property for less than £750. The vendor's husband, on one reading of his evidence, apparently wished the judge to understand that this position was specifically made clear to the solicitors after an auction had been decided upon, but, whether or not this suggestion was accepted by the judge, it seems clear that he accepted the evidence of Marten, a member of the firm of solicitors, that the solicitors knew that Mrs. Hill wanted £750 for the property and (as I understand it) was not prepared to sell for less. The auctioneers were instructed by the solicitors, and, if the solicitors knew that Mrs. Hill was not prepared to accept less than £750, they could not authorise the auctioneers to sell for less. In some circumstances, an authority from the client to the solicitor to get the property sold by auction may well imply an authority to sell subject to a reserve price fixed by the auctioneers, but I am not prepared to hold that, as the evidence stood, the judge was wrong in taking the view, as he apparently did, that, in acceding to the suggestion that there should be a sale by auction, the vendor neither in fact nor in the view of the solicitors departed from the position that the property was not to go for less than £750. If that be so, the solicitors could not give the auctioneers authority to sell for less.

What happened in fact was that, before the auction, the auctioneers formed the view that £600 was the right reserve, and tried to get in touch with the vendor in order to get her to authorise that figure as the reserve. Owing to the absence of the vendor abroad, it was not found possible to get into touch with her. Unfortunately, owing to the absence on vacation of the partner in the firm of solicitors who had been dealing with the matter, the business was done by a clerk, who knew nothing about the limit of £750, and he took it upon himself (but, on the facts as I have stated them, without any authority from the vendor) to instruct the auctioneers to fix the reserve at £600. This, however, does not affect the position if the solicitors' authority to act for the vendor in the matter of the sale (whether by auction or otherwise) was in fact limited to a sale at £750 or over, and I cannot see my way to hold that the judge was wrong in holding that to be the position. That seems to me to be the end of the case, for the contention that the memorandum recorded a merely conditional contract—conditional on the figure of £600 being found to be not less than the reserve—appears to me quite untenable. The contract is a clear contract for a sale at £600, and, when read with the conditions appears to imply that the reserve, if any, is not greater than £600.

The only remaining point involves the proposition that the auctioneers by being authorised to sell by auction were impliedly authorised to sell without regard to the wishes of the vendor as to the minimum price. No authority for this proposition was cited, and it appears to me to be contrary to principle. A plaintiff who is suing an alleged principal on a contract made by an agent is bound to prove either that the agent was in fact authorised by the principal to make the contract on the principal's behalf or that, on the facts, the principal is estopped from setting up want of authority by the agent. Where the conditions of sale disclose (in the clause which reserves to the principal the right to fix a reserve) that the principal reserves the right to limit the agent's authority to a sale at or above an undisclosed figure, the purchaser takes on himself the risk that the auctioneer, in selling at the price named in the note, is exceeding his authority, and relies in practice on the care and honesty of the auctioneer as a professional man, and in law on his (the purchaser's) right to sue the auctioneer on the warranty of authority implied in the fact of his selling on his principal's behalf at the figure named in the note.

In the result, I see no answer to the purchaser's claim for damages against the auctioneers for breach of warranty of authority, and it follows that, in my judgment, the judge's dismissal of the purchaser's action against the auctioneers must be reversed, and the purchaser must be declared entitled to recover damages against the auctioneers for breach of warranty of authority, and an inquiry as to such damages must be directed. The auctioneers must pay the purchaser's costs of the action in so far as they relate to her claim against the auctioneers, and also the purchaser's costs of this appeal. On the inquiry, the costs incurred by the purchaser in the action, so far as they relate to her claim against the vendor, and the costs she has become liable to pay to the vendor will form part of the damages. The costs of the inquiry as to damages will be reserved.

DU PARCQ, L.J. [read by SIR WILFRID GREENE, M.R.]: I have had the advantage of reading the judgments of SIR WILFRID GREENE, M.R., and CLAUSON, L.J. I am in agreement with them, and have nothing to add.

Appeal allowed.

Solicitors: *Pinsent & Co.*, agents for *F. B. Jevons & Riley*, Tonbridge (for the appellant); *W. A. G. Davidson & Co.* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

WEINER *v.* CENTRAL FUND FOR GERMAN JEWRY.

[KING'S BENCH DIVISION (Singleton, J.), **February 14, 17, 18, 1941.**]

Aliens—Trading with the enemy—Sum deposited by British subject for help of refugees—Recovery of deposit.

Emergency Legislation—Trading with the enemy—Sum deposited by British subject for help of refugees—Recovery of deposit—Trading with the Enemy Act, 1939 (*c.* 89) *s.* 1.

The plaintiff, a British subject, deposited a sum of money with the defendants for the purpose of helping two named refugees to come from Vienna to England. The outbreak of war before any steps could be taken in the matter rendered the carrying out of this purpose impossible. The plaintiff commenced an action for the recovery of the deposit, but admitted that, in view of what had happened with respect to the sum deposited he had no right to it and was willing that it should be handed over to the Custodian of Enemy Property. It was contended that these were proceedings on behalf of enemy aliens which could not be entertained by the courts in England :—

HELD : this was not a case which must be rejected *in limine.* The rights of the plaintiff could be determined by the court, but any sum recovered must be paid to the Custodian of Enemy Property for the purpose of ensuring that it did not pass into the hands of an enemy alien.

[**EDITORIAL NOTE.** It was pointed out by the Court of Appeal in *Stockholms Bank* v. *Schering, Ltd.* (5) that in actions the result of which may benefit an enemy subject there are two possible forms of order. If the judgment will result in a direct benefit to the enemy, the proper course is to dismiss the action. There are, however, cases where the benefit is not so direct and a sufficient safeguard of the public interest is secured by a declaration of the rights of the parties accompanied by what has been termed a stay, but, in practice, this means that the sum recovered is paid to the Custodian of Enemy Property to deal with as may be determined at a later date.

AS TO TRADING WITH THE ENEMY, see HALSBURY, Hailsham Edn., Vol. 1, pp. 460, 461, para. 179 ; and FOR CASES, see DIGEST, Vol. 2, pp. 169-174, Nos. 379-400.]

Cases referred to :

(1) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel* (*S.*) *& Rosenfeld, Re Merten's Patents,* [1915] 1 K.B. 857 ; 2 Digest 156, *260* ; 84 L.J.K.B. 1001 ; 112 L.T. 313.

(2) *Brandon* v. *Nesbitt* (1794), 6 Term Rep. 23 ; 2 Digest 165, *355.*

(3) *Anthon* v. *Fisher* (1795), 3 Doug. K.B. 166 ; 2 Digest 156, *268.*

(4) *Ricord* v. *Bettenham* (1765), 3 Burr. 1734 ; 2 Digest 156, *266.*

(5) *Stockholms Enskilda Bank Aktiebolag* v. *Schering, Ltd.*, [1941] 1 All E.R. 257 ; Digest Supp.

(6) *Schmitz* (*Schmidt*) v. *Van Der Veen & Co.* (1915), 84 L.J.K.B. 861 ; 2 Digest 172, *387* ; 112 L.T. 991.

ACTION to recover money deposited with the defendants. On June 23, 1939, the plaintiff, a British subject, deposited a sum of £303 in sterling and $2,921 with the defendants on behalf of Dr. and Mrs. Berger, of Vienna, who were seeking permission to come to this country, probably with a view to immigration to the United States of America. The defendants, a charitable institution of repute, at the request of the Home

Office were in the habit of investigating and sponsoring such applications from German and Austrian nationals, and, according to their practice, in this case they asked for a deposit of money to ensure that such persons should not become a charge on the public funds of this country, as well as a guarantor or an offer of hospitality. The plaintiff fulfilled all these requirements, but alleged that the defendants in turn had taken no steps to secure the admission to this country of Dr. and Mrs. Berger, and accordingly he requested the return of the deposit. The defendants stated that in Aug., 1939, the Home Office requested them not to put forward any further applications, and eventually they gave orders to their bank to remit to the original depositor the sum of £926 16*s.* 1*d.*, whereupon the plaintiff pointed out that this sum represented £100 less than the amount deposited. The defendants replied that, in accordance with their usual practice, on receipt of the money they had converted the dollars into sterling, and that any resulting loss must be borne by the depositor. The plaintiff then issued a writ claiming damages for (i) breach of contract, (ii) return of moneys paid for a consideration which had failed, and (iii) breach of duty. The defendants having entered a defence, then obtained leave to amend it by putting in issue the right of the plaintiff to sue on the ground that the money was held on behalf of an enemy alien. The plaintiff, by his counsel, admitted that he had no right to the sum in question and stated that he was willing that any sum recovered should be paid to the Custodian of Enemy Property. It is only the decision given in regard to this preliminary point which is reported here.

H. Wynn Parry, K.C., and *A. S. Diamond* for the plaintiff.
J. Valetta for the defendants.

SINGLETON, J.: It was intimated to me at a very early stage by counsel for the defendants that a preliminary objection would be taken that I could not hear this case because the claim was made, as he submitted, on behalf of enemy aliens. He based his argument very largely upon two cases, one of which is *Porter* v. *Freudenberg* (1), and in particular he relied upon the words of LORD READING, L.C.J., in that case, at p. 871:

> Towards the end of the eighteenth century LORD KENYON, C.J., in delivering the judgment of the Court of King's Bench in *Brandon* v. *Nesbitt* (2), said that "An action will not lie either by or in favour of an alien enemy . . ." and that the Court "had not found a single case in which the action had been supported in favour of an alien enemy . . ."

Counsel for the defendants submitted that this could only be regarded as an action brought in favour of an enemy alien, in that the plaintiff, himself a British subject, said, through his counsel: "I do not want this money for myself. I recognise that I have no right to it in view of what has happened, and I am ready and willing that it should go to the Custodian of Enemy Property, to whom the £926 16*s.* 1*d.* has gone."

In the course of the correspondence, the plaintiff had referred this matter to the Custodian of Enemy Property. As I have said, the £926 16*s.* 1*d.* was paid to him or collected by him, and the plaintiff drew the attention of the Custodian of Enemy Property to this claim. The answer of the Custodian of Enemy Property was not very clear, I thought, and possibly not as helpful as it might have been, and it was that which caused me to suggest to the plaintiff that he should again communicate with the Custodian of Enemy Property. This was done, and the result was that he expressed his willingness to be joined as a party if it was thought necessary. In fact, however, I did not think that it was necessary.

Counsel for the defendants also referred me to *Brandon* v. *Nesbitt* (2). That was a case in which an action was brought by an English broker on a policy, the persons who were entitled under the policy being all of them in the category of, or in the same position as, enemy aliens, and it was held that the action would not lie. The argument of counsel in that case, at p. 24, is interesting as showing the general principle which he was arguing was to the effect that, if an enemy alien cannot bring an action, it would be idle to let somebody else bring it on his behalf, completely idle, in the ordinary course. LORD KENYON, C.J., is thus reported at p. 28:

> The court had considered this case and unless anything more could be urged at the bar to shake the opinion they had formed, they were of opinion that judgment must be given for the defendant on this ground, that an action will not lie either by or in favour of an alien enemy. That the case of *Anthon* v. *Fisher* (3) which was argued in this court, and upon which judgment was given here for the plaintiff *pro forma*, in order to give an opportunity of bringing a writ of error, (the judges of the court being divided in opinion) and which judgment was afterwards reversed in the Exchequér Chamber, proceeded on the same principle. That they had not found a single case in which the action had been supported in favour of an alien enemy. For though it was held in *Ricord* v. *Bettenham* (4) that the action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which gets rid of the objection.

That passage, which was cited in the judgment of LORD READING, L.C.J., in *Porter* v. *Freudenberg* (1), seemed to me to be very wide in its terms, and there was read to me a judgment of the Court of Appeal in *Stockholms Enskilda Bank Aktiebolag* v. *Schering, Ltd.* (5), where SIR WILFRID GREENE, M.R., giving the judgment of the court, said that judgment, in the circumstances of that case, must be for the defendants. It was clear that, if the court gave any other judgment, or gave a judgment which the plaintiff claimed, they would be helping an enemy alien in one particular way, and would be putting him in a better position than that in which he already was. However, it is to be observed that in that case the judgment of ROWLATT, J., in *Schmitz (Schmidt)* v. *Van Der Veen & Co.* (6) was cited, and, so far as I could follow from the reading of that report of the judgment in the Court of Appeal by counsel for the defendants, the Court of Appeal did not express anything in the nature of disapproval of the judgment of ROWLATT, J., in *Schmitz (Schmidt)* v. *Van Der Veen & Co.* (6). Indeed, rather the contrary, as SIR WILFRID GREENE, M.R., pointed out the difference in the facts.

The headnote in *Schmitz (Schmidt)* v. *Van Der Veen & Co.* (6) is as follows:

> The plaintiff, a British subject in England, claimed payment for goods sold by him to the defendants, a London firm, before the outbreak of war. Part of the sum due was payable by the plaintiff to an alien enemy in Germany: HELD that as the

claim at common law was unexceptionable, the plaintiff was entitled to recover, as he consented to hold the amount recovered until a summons to vest it in the custodian appointed under the Trading with the Enemy Amendment Act, 1914, had been taken out which would obviate the risk of its benefiting an alien enemy. **Held**, further, that the fact that such payment improved the present position of the alien enemy by giving him further security that he would ultimately recover the money, did not constitute it the offence of trading with the enemy within the meaning of sect. 1, subsect. 1 and 2 of the Trading with the Enemy Act, 1914, as being a payment "for the benefit of an enemy" within para. 5 (1) of the Trading with the Enemy Proclamation (No. 2) of Sept. 9, 1914. A

The Trading with the Enemy Act, 1914, was in all material respects the same as the Trading with the Enemy Act, 1939. Having dealt with the facts, Rowlatt, J., said, at p. 864 : B

> Now certain things are well settled. In the first place an alien enemy cannot maintain an action . . . he is entitled to recover.

Then Rowlatt, J., guarded himself against another position which might arise, and he went on to deal with the Trading with the Enemy Act, 1914. Then he said what form of order might be made in that particular case. C In other words, he suggested a stay of execution pending a vesting order under the relevant section of the Act of 1914.

I pointed out to counsel for the defendants that I thought that it was desirable that the position should be made clear, if he was right, because this would affect, not only the money claimed in this action, but also the D total deposit made by anyone in circumstances of this kind and the total deposit made in every other case of a like kind, and, if his argument was right, as I pointed out to him, it was open to the defendants to say : "This Committee, which is doing laudable work, it is true, has the money. We have money deposited with us by British subjects, but in E fact it is deposited by arrangement with us by an enemy alien, or by someone who has become an enemy alien by the outbreak of war, and it is really their money, or they have made it good, and they are interested. Consequently, if you sue us, the action is to be looked upon as an action for an alien enemy, and cannot be considered." F

I said that I could not help thinking that depositors with the defendants who might be in a like position would be interested to know what the position was and, in a case where no question of public policy was involved, I could not see why the defendants should keep money in those circumstances, if all the plaintiff wanted to do was to G ascertain the rights of those who had deposited money with the defendants. However, the money must go to the Custodian of Enemy Property, as a question of public policy may be involved.

In *Schmitz (Schmidt)* v. *Van Der Veen & Co.* (6), Rowlatt, J., said, at p. 864 : H

> It would indeed be wholly unreasonable, especially where the plaintiff is himself interested in part of the proceeds of the action, to let the defendant keep the money in hand ; the cases referred to show that it is not the law.

I think that it is wholly unreasonable in this case if the defendants are able, by reason of this plea, to keep the money of depositors, and of this depositor in particular, assuming for the moment that the money is due. A vesting order can be made and a stay of execution can be granted, in order to ensure, if the plaintiff is entitled otherwise to succeed, that the money goes to the Custodian of Enemy Property.

In *Schmitz's* case (6), Rowlatt, J., drew attention to the limitation of the right to sue, which of course applies to every cause of action, and said, at p. 864:

> Provided, of course, he is otherwise entitled to sue in his own name.

That may give rise to a more difficult question when I come to it, but I have no doubt in my own mind that, in a case of this character, it would not be right to say that the preliminary point succeeds and that defendants in a position such as that of the defendants in this case should be heard to say: "You, Mr. Weiner, a British subject, deposited money with us, but you honestly and properly say that you do not want it for yourself now, and you think that it should go to the Custodian of Enemy Property. Therefore, you cannot be heard, because your action is on behalf of, or in favour of, an enemy alien." I think that the plaintiff is a person who is in a position to sue, and that any questions which arise under the Trading with the Enemy Act, 1939, can be dealt with, if necessary, in the same way as they were dealt with by Rowlatt, J. The preliminary point, therefore, fails.

His Lordship then proceeded to deal with the other points in the case, and, in the result, gave judgment for the plaintiff for the amount claimed. He said that the judgment should take the same form as that suggested by Rowlatt, J., in *Schmitz* (*Schmidt*) v. *Van Der Veen & Co.* (6). His Lordship also gave judgment for the plaintiff on the counterclaim, and awarded the plaintiff costs on claim and counterclaim.

Solicitors: *Cassavetti, Coustas & Co.* (for the plaintiff); *Bartlett & Gluckstein* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law*].

COCKER *v.* SHEFFIELD CORPORATION.

[Court of Appeal (Scott, MacKinnon and Luxmoore, L.JJ.), **April 1, 8, 1941.**]

Workmen's Compensation—Average weekly earnings—Change of grade—Adoption of classification of employees by employers—Workmen's Compensation Act, 1925, (*c.* 84), *s.* 10 (i). A

The appellant entered the service of the respondents on Sept. 21, 1938, as a non-resident nurse-attendant. In Aug., 1939, the respondents adopted certain scales of pay for nurse-attendants, classifying them according to the length of their experience. On Sept. 21, 1939, having then B had one year's experience, the appellant became entitled to and was paid a higher salary. On Dec. 9, 1939, she met with an accident arising out of and in the course of her employment. The question was whether the compensation payable to her should be calculated on the actual amount received by her in the previous twelve months or on the rate of pay she was receiving at the date of the accident :—

C

Held (MacKinnon, L.J., *dissenting*) : the defendants had adopted a classification of nurse-attendants sufficient to amount to a graduation of them so distinct as to constitute separate grades within the Workmen's Compensation Act, 1925, s. 10, notwithstanding the similarity of the work and the identity of the generic name. The appellant was, therefore, entitled to compensation based on her rate of pay at the time of the accident on the footing that there had been a change of grade. D

[**EDITORIAL NOTE.** It has been said that the grade of a workman is the particular rank in the industrial hierarchy occupied by the workman and not his greater or less excellence in that rank. An increase of wages, it has often been pointed out, does not necessarily mean a change of grade. It must be accompanied by some change in the class of work done. Then, in the case cited herein by Luxmoore, L.J., it was held that casual dock labourers who received the same rate of E pay were in different grades according to their chance of obtaining employment. It seems clear that the authorities require consideration by the highest tribunal. Meanwhile, it should be noted that, in the present case, there was no finding that there was any change in the work done by the nurse-attendant and the decision is based solely on the fact that the employers had classified these employees in such a way as to constitute different grades. F

As to Grade of Employment, see HALSBURY, Hailsham Edn., Vol. 34 pp. 938-940, para. 1284 ; and for Cases see DIGEST, Vol. 34, pp. 428, 429, Nos. 3487-3493. See also WILLIS'S WORKMEN'S COMPENSATION, 33rd Edn., pp. 344-347.]

Cases referred to : G

(1) *Barnett* v. *Port of London Authority, Priestley* v. *Port of London Authority*, [1913] 2 K.B. 115 ; 34 Digest 424, *3449 ;* 82 L.J.K.B. 353 ; 108 L.T. 277; 6 B.W.C.C. 105.

(2) *Perry* v. *Wright, Cain* v. *Leyland & Co.* (*1900*), *Ltd., Bailey* v. *Kenworthy, Ltd., Gough* v. *Crawshay Brothers, Cyfartha, Ltd.*, [1908] 1 K.B. 441 ; 34 Digest 409, *3329 ;* 77 L.J.K.B. 236 ; 98 L.T. 327 ; 1 B.W.C.C. 351. H

(3) *Jury* v. *Atlanta* (*Owners*), [1912] 3 K.B. 366 ; 34 Digest 429, *3491 ;* 81 L.J.K.B. 1182 ; 107 L.T. 366 ; 5 B.W.C.C. 681.

Appeal by the workman from an award of His Honour Judge Essenhigh sitting at the Sheffield County Court, dated Oct. 31, 1940. The facts are fully set out in the judgment of Scott, L.J.

F. A. Sellers, K.C., and *S. R. Edgedale* for the appellant.

N. L. C. Macaskie, K.C., and *H. R. Bramley* (for *J. F. Drabble* on war service) for the respondents.

Sellers, K.C.: By the terms of the appellant's employment, it is impossible to ascertain her average weekly earnings for the 12 months before the accident. The procedure provided by the section should be adopted, and the calculation should be made on the basis of the earnings of a nurse-attendant of one year's standing who had worked as such for a full 12 months as provided by sect. 10 (1). It cannot be a true interpretation of the statute to say that, if two nurses who were both doing the same work for the same salary were injured, one should get a different rate of compensation from the other. [Counsel referred to *Jury* v. *Atlanta* (*Owners*) (3).]

Edgedale followed on the same side.

Macaskie, K.C.: A change of "grade" must have some reference to the kind of work and responsibility. There must be a step in the labour world. The Act deliberately ignores the test of the rate of wages. Here there was a mere rise in wages.

Scott, L.J.: The respondent became entitled in Dec., 1939, to weekly compensation for total incapacity, continuing for about 3 months, by reason of an accident arising out of and in the course of her employment. She had originally entered the employment of the appellant corporation on Sept. 21, 1938, as "a non-resident nurse-attendant without experience" at one of their mental hospitals. On Sept. 21, 1939, her rate of wages, including uniform, was raised by 2*s.* 8*d.* pursuant to a resolution of the council passed in Aug., 1939, to the effect that non-resident nurse-attendants after one year's experience should have that increase of wages. The issue in the case is as to whether she was entitled to have her compensation under the Act based upon her current rate of wages (including uniform) since September, or only on the average of her wages for the 12 months preceding the accident. The corporation paid her on the basis of the year's average—namely, £1 3*s.* If she is right, she is entitled to 1*s.* 1*d.* more. The judge held in the arbitration that the respondents were right in so computing her compensation and dismissed her claim. The question in the present case is not an easy one to answer. My brethren differ. At first I was inclined to agree with MacKinnon, L.J., but, for reasons which I will state, I agree with Luxmoore, L.J., that we must allow the appeal. The relevant provisions of the Act regarding the amount of compensation are all contained in sects. 9 and 10. Section 9 is mandatory. Subsection (1) provides that the weekly amount "shall be . . . calculated in accordance with the rules hereinafter contained." Subsection (2) states the rule for total incapacity in such a case as the present:

> . . . a sum not exceeding 50 per cent. of the workman's average weekly earnings during the previous 12 months, if he has been so long employed by the same employer . . .

The details of rule (ii) which applied to the applicant do not affect the present point. Another rule "hereinafter contained" defines the phrase "employment by the same employer" as employment by the same employer in the same grade in which the workman was employed at the time of the accident. That is sect. 10 (iii). Accordingly, if the respondent changed her "grade" when her rate of wages was raised by 2*s*. 8*d*. in Sept., 1939, the change made the ordinary twelve months' averaging provision of sect. 9 (2) (i) inapplicable. However, the judge held that she had not changed her grade. The rule which her counsel contended was applicable to the computation of her earnings was sect. 10 (i), which provides as follows :

> Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated : Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

The first phrase to be construed is "impracticable at the date of the accident to compute the rate of remuneration." In my opinion, "the rate" is the 12 months' average of wages with the same employer provided by sect. 9 (2) (i), both because sect. 10 (i) is one of "the rules hereinafter contained" to which sect. 9 (1) refers, and because "the average weekly earnings" to be "computed" according to sect. 10 (i) must be the same average earnings as are made the basis of computation by sect. 9 (2) (i). It follows that, if the period of employment by the same employer in the same grade is less than 12 months, "the shortness of time" must render it "impracticable" to make the necessary computation. Where, however, one cannot get a 12 months' average of the workman's earnings with the same employer in the same grade, the proviso to the rule permits resort to the nearest parallel case—namely, that of another workman in the same grade in the employment for 12 months of the same employer, or, if that standard is not available, one employed in the same grade in the same class of employment in the same district. I do not think that the second exception in the proviso from the normal rule of sect. 9 (2) (i)—namely, "the terms of the employment"—has any relevance in the present case.

The relevant authorities have been cited by Luxmoore, L.J., and the judgment of Hamilton, L.J., in *Barnett* v. *Port of London Authority* (1) is the most directly in point. The question of grade is usually a mixed one of fact and of law. In the present case, it is almost wholly one of law, because the only evidence about the meaning of the word as used in regard to the relationship of the Sheffield Corporation and their staffs and workpeople is all contained in a printed report of Aug., 1939, defining the contractual terms of employment with the recommendations of the relevant committees for changes of remuneration which, it was common ground before us, had thereafter been acted on by the corporation and their employees in their contractual relations—in the case of the appellant from Sept., 1939. The meaning of the word " grade " as used by the corporation is to be ascertained, therefore, by the interpretation of the written document. It is on the right construction of that document that I have found myself in agreement with Luxmoore, L.J., and unable to agree with MacKinnon, L.J.

In considering the language of the document, however, it is well to bear in mind that the statute uses the two words " grade " and " class " in sect. 10 (i) as having different senses, the latter word being wider than the former when applied to employments. That differing rates of remuneration do not necessarily connote different grades I recognise, but remuneration may be one factor in such a difference, and in the report it is noteworthy that the recommendations are made with a view to " the unification of remuneration of various grades of staff and workpeople," which I interpret as meaning that the rates of remuneration are to be unified as between persons in the same grade. The next point is that all " grades " other than those of the official staff are " classified " and " the council's general rules " are not to apply to workpeople except as provided in the scheme or in any future subsidiary scheme to be approved in relation to any class of employee, thus echoing the statutory words in sect. 10 (i). Later in the report there is a table of classification, I think for the purpose of designating the different classes. Then, later again, assistant nurses, resident and non-resident, are put into different categories, where remunertion varies with years of experience. Precisely similar categories appear further on in the case of " nurse-attendants " like the appellant. Then all " grades " of " attendants " are apparently graded by years of experience, and some of them have their remuneration stepped up accordingly, and the very word " grade " is used. Later on, head cooks are called " Grade 1," " Grade 2 " and " Grade 3," the only expressed indications of the reasons for the grading being differences of pay. It is recommended that an " assistant cook and housemaid " at one hospital be put into " Cook Grade 3," and one seamstress be " graded £50-5-60," meaning at a wage of £50 rising by instalments of £5 to £60. Again, a non-resident relief foster-mother is to be " graded " as " an assistant foster-mother," and apparently is to have a rise of pay from £90 or £95 to £120 or its equivalent in cash, board and lodgings. Standing alone, this recommendation would seem to give the name of " grades " to what I have thought are " classes," and would be an argument in favour of the judge's view, but the real meaning of the word must be gathered from the whole document. I confess that the document is far less clear than it might be, but the initial and general distinction it makes between " class " and " grade," following the distinction in the statute, inclines the balance of inference in favour of treating the three categories of nurse-attendants as grades, and the cogent argument of Luxmoore, L.J., as to the difficulty in practice of applying the analogous test of another person, whether in the employment of the same employer or in that of another employer in the same district, in order to arrive at the putative earnings for 12 months of the incapacitated workman tips the balance definitely down in favour of construing the word " grade " as he construes it.

Counsel for the appellant addressed another argument to us, of which there is no trace in the court below—namely, that the first three lines of sect. 10 (i) are an overriding provision requiring the court to reject the 12 months' average if it thinks it unfair in its operation. The answer to that argument is plain. The average referred to in those lines of the rule is the 12 months' average laid down by sect. 9, and the first sentence of sect. 10 (i) must be so construed. On this point, it is to be borne in mind that the 12 months' average was enacted in 1897 in the first Act, and has been maintained ever since. The appeal must be allowed with costs here and below. The costs in the court below are to be on scale C on account of the very general nature of the question of law raised.

MacKinnon, L.J.: This is an appeal from His Honour Judge Essenhigh as arbitrator in a claim under the Workmen's Compensation Act, 1925. In September, 1938, the applicant entered the service of the respondents as a non-resident nurse-attendant. Her initial salary was at the rate, in money or money's worth, of £2 0*s*. 5*d*. per week and she was apparently promised that after a year's service this amount would be subject to some increase. For one week in Sept., 1939, she was paid £2 4*s*. 4*d*., for the next week she was paid £2 5*s*. 11*d*., and from Sept. 28 onwards she was regularly paid £2 6*s*. 3*d*. On Dec. 9, 1939. she met with an accident arising out of and in the course of her employment and was totally incapacitated until Feb. 3, 1940. During that period, the respondents paid her £1 3*s*. per week. On May 22, 1940, the applicant made a claim for arbitration. The claim stated the foregoing facts, but asserted that the weekly payment of £1 3*s*. was insufficient, and that it ought to have been £1 4*s*. 1*d*. She therefore claimed 1*s*. 1*d*. per week for the period of her disablement. The figure of £1 3*s*. was arrived at by the respondents by adding up the weekly payments made for 12 months before the accident—namely, 38 weeks at £2 0*s*. 5*d*. per week, one week at £2 4*s*. 4*d*., one week at £2 5*s*. 11*d*., and 12 weeks at £2 6*s*. 3*d*. per week—dividing that total by 52, and dividing the resulting figure by 2. The applicant contended that this method of computation was wrong, and that the calculation should have been made upon the basis of her weekly wage being, not 1/52nd part of the sums paid to her during the 12 months, but £2 6*s*. 3*d*. per week. The Workmen's Compensation Act, 1925, s. 9, provides as follows :

> (1) The compensation . . . shall be a weekly payment . . . calculated in accordance with the rules hereinafter contained. . . . (2) The rules for calculating the weekly payment in the case of total incapacity shall be—(i) the weekly payment shall . . . be a sum not exceeding 50 per cent. of the workman's average weekly earnings during the previous 12 months, if he has been so long employed by the same employer.

The respondents' case is that they have arrived at the weekly payment of £1 3*s*. by a literal and exact compliance with the terms of that section, and, if that section stood alone, there can be no doubt that they are right. The applicant, however, seeks to rely on the further provisions in sect. 10. That provides rules to be observed :

> For the purposes of the provisions of this Act relating to . . . " average weekly earnings " . . .

The material part is as follows :

> (i) Average weekly earnings shall be computed in such a manner as is best calculated to give the rate per week at which the workman was being remunerated : provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer . . . or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the 12 months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer . . .

The argument for the applicant seems to be this : " On Dec. 9, at the date of the accident, I had not been employed for 12 months in the grade in which I then was. I had been so employed only since the date in September when my previous wage became increased to £2 6*s.* 3*d.*" Whether that is the date when the change of " grade " is suggested, or the previous week, when the original £2 0*s.* 5*d.* had become £2 5*s.* 11*d.*, or the week before that, when the £2 0*s.* 5*d.* had been increased to £2 4*s.* 4*d.*, I am not clear. The applicant's argument continues as follows : " It is impracticable, therefore, to apply to my case the average earnings for 12 months, and resort should be had to ' the average weekly amount which, during the 12 months previous to the accident, was being earned by a person in the same grade.' That amount would be £2 6*s.* 3*d.*, the amount I was being paid in Dec., 1939." No question as to figures, on the rival contentions as to principle, has been raised. In fact, however, it appears that the £2 6*s.* 3*d.* for a non-resident nurse-attendant in the second year of her service was not fixed by the corporation until the end of Aug., 1939, so that the average weekly earnings from Dec., 1938, to Dec., 1939, of a servant in that " grade "—if it be a grade—were not necessarily £2 6*s.* 3*d.*

The only question raised in the arbitration was whether or not the applicant entered a new " grade " of employment in Sept., 1939. The arbitrator held that she did not, and I agree with him. She was in Dec., 1939, what she had been from Sept., 1938—namely, a non-resident nurse-attendant—and all that happened in Sept., 1939, was that her weekly wage was increased. Very similarly, I observe in the passage in the report dealing with the corporation servants that a non-resident porter is to have 55*s.* per week to start, rising to 57*s.* 6*d.* after two years, and 60*s.* after 4 years. It would be an abuse of language to say that a non-resident porter entered upon a new grade of employment when his weekly wage was increased by 2*s.* 6*d.*, and entered upon yet another grade when it was increased by a second 2*s.* 6*d.* Thus, in this case, I think that the grade of the appellant was that of a non-resident nurse-attendant with an annual increase of pay. In my opinion, therefore, the decision of the arbitrator was correct and this appeal should be dismissed.

Counsel for the appellant raised a further argument before us which apparently was not used below, and which I think was suggested to him by a remark of Luxmoore, L.J., in the course of the argument. The opening words of sect. 10 (i) provide as follows:

> Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated . . .

In this case, it was said, we know that in Dec., 1939, the workman's regular and agreed wage was £2 6*s*. 3*d*. Therefore, it is simple and easy to take £2 6*s*. 3*d*. as the " average weekly wage," and such a computation is " best calculated to give the rate per week at which the workman was being remunerated."

It is somewhat surprising that the Act does not provide that, where the workman is, by his contract of employment, being paid a certain weekly sum at the time of his accident, that sum shall be the amount at which to assess his compensation. However, the Act does nothing of the sort. Sect. 10 provides a definition of " average weekly earnings." The very phrase imports the adding up of a number of weekly earnings and the division of the total by that number, and, in truth, the definition or explanation of " average weekly earnings " refers back to sect. 9. In that section, the phrase is " the workman's average weekly earnings during the previous 12 months," and, in truth, the shortened phrase in sect. 10 should be : " The workman's average weekly earnings during the previous 12 months shall be computed." For better or for worse, the Act has based the calculation of compensation upon the average of earnings for the previous 12 months, and has deliberately abstained from basing it upon the amount of the weekly wage which by any agreement is in fact being paid at the date of the accident. The respondents have rightly calculated the compensation upon this average for the previous 12 months, and, unless the applicant can succeed, as I think she cannot, in saying that it is impracticable to resort to that method, since she has not been employed for 12 months in the same grade, I think that she has no other means of impugning the assessment of her compensation adopted by the respondents. In the result, I think that this appeal should be dismissed.

Luxmoore, L.J.: In my opinion, this appeal should be allowed. The evidence establishes that on Sept. 21, 1938, the appellant entered the service of the Sheffield Corporation as a non-resident nurse-attendant at its institution carried on at Fir Vale House. At that time, the corporation paid non-resident nurse-attendants on the scale set out in the schedule to a document in evidence before the county court judge entitled :

> The report and recommendations regarding salaries, wages and conditions of service as adopted by the Public Assistance and Health Committees on Aug. 28, 1939, and Aug. 29, 1939, respectively.

This scale shows that a non-resident nurse-attendant without experience was, at the date of the report, paid 38*s*. 6*d*. per week, plus a uniform allowance, that such a nurse with one year's experience was paid a weekly wage of 40*s.* 5*d.*, with two years' experience a weekly wage of 42*s.* 4*d.*, and with three years' experience a weekly wage of 44*s.* 3*d.* In each case, the uniform allowance was to be paid in addition to the fixed weekly wage. The report recommended that these weekly wages should be increased in the case of a non-resident nurse-attendant without experience to 42*s.* 4*d.* per week, with one year's experience to 44*s.* 3*d.* per week, and with two years' experience to 46*s.* 2*d.* per week. In each case, there was a fixed weekly allowance for uniform. The new scale of wages came into force in September., 1939, and for the week ending Sept. 14, 1939, the appellant received as her wages for that week the sum of 42*s.* 4*d.*, plus 2*s.* for uniform allowance, instead of the sum of 38*s.* 6*d.* and 1*s.* 11*d.* uniform allowance received for the previous week. Her one year's employment ended on Sept. 20, and on Sept. 21, 1939, she became a non-resident nurse-attendant with one year's experience, and, accordingly, for the week ending Sept. 21, 1939, instead of receiving the full 44*s.* 3*d.*, plus 2*s.* uniform allowance, payable to a nurse with one year's experience under the new scale, she received, apart from her uniform allowance, 43*s.* 11*d.* This is the proper amount for that week if the week's salary is apportioned between the two rates—namely, five days at 42*s.* 4*d.* per week and one day at 44*s.* 3*d.* per week. From Sept. 21, 1939, the appellant received the full weekly salary of 44*s.* 3*d.* and 2*s.* uniform allowance payable under the new scale to a non-resident nurse-attendant with one year's experience down to the week ending Dec. 14, 1939, together with her uniform allowance. On Dec. 9, 1939, the appellant injured her ankle owing to an accident which admittedly arose out of and in the course of her employment. The injury caused total incapacity for work until Feb. 3, 1940, a period of 8 weeks. The corporation paid the appellant £1 3*s.* per week during the whole period of incapacity, this sum being based on an average weekly wage of 41*s.* 11*d.* during the 12 months preceding the date of the accident. The appellant instituted the appropriate arbitration proceedings under the Workmen's Compensation Act, 1925, on May 22, 1940, because she claimed that her compensation should be fixed at £1 4*s.* 1*d.*, which is admittedly the appropriate amount payable to her if compensation is to be calculated on the basis of an average weekly wage of 44*s.* 3*d.*, plus 2*s.* uniform allowance. It was contended before the county court judge that the appellant, having completed the first year of her employment on Sept. 20, 1939, entered upon a different grade of employment, and on Sept. 21, 1939, became a non-resident nurse-attendant with one year's experience, and that, consequently, her compensation ought to be fixed on the weekly average of her earnings from Sept. 20, 1939, to the date of the accident, which must of necessity be 46*s.* 3*d.* The county court judge held that there was no change of grade of employment on Sept. 21, 1939, "as laid down by the cases," and accordingly he dismissed the appellant's application and made an award in favour of the Sheffield Corporation with costs. It is from this award that the appellant has appealed to this court asking that the decision and award of the county court judge might be set aside and that an award be made in her favour for the payment of £1 4*s.* 1*d.* per week during incapacity, credit being given for the amounts already paid, for a declaration of liability, and for an order that the Sheffield Corporation should pay the appellant's costs of this appeal and of the arbitration. In my judgment, the substantial question to be determined is whether there was a change in the grade of the appellant's employment on Sept. 21, 1939. If there was, it seems to me to be settled by the decision of this court in *Perry* v. *Wright* (2) that, in the case of a person whose grade of employment is changed during the period of 12 months immediately preceding the accident, the basis of compensation is the weekly average ascertained, not over the full 12 months, but only over the period from the date of change of grade to the date of the accident. This is the necessary result of the importation into sect. 9 (2) (i) of the Act of the definition contained in sect. 10 (iii) :

> . . . employment by the same employer in the grade in which the workman was employed at the time of the accident.

It is a question of law whether, upon the facts as found, there has been a change of grade within the meaning of the Act : *Jury* v. *Atlanta* (*Owners*) (3). While it is true, as Moulton, L.J., said in *Perry* v. *Wright* (2), at p. 457, that a change of wages does not necessarily indicate a change of grade, yet I think that it is a fact which must be taken into consideration in determining whether or not there has been such a change, and it is not unimportant to ascertain whether the change of wages is temporary or reasonably permanent. In my judgment, considerable light is thrown on the problem of whether or not there has been a change of grade in the present case by a consideration of the judgments of Buckley and Hamilton, L.JJ., in *Barnett* v. *Port of London Authority* (1). The evidence in that case was that the Port of London Authority employed at the London docks two classes of casual labourers—namely, those who had " B " tickets, entitling them to be called on next after the permanent men had been employed, and those known as " extra casual " labourers, who had no tickets and were not called on until both the permanent men and the " B " casual labourers had been employed. The pay per hour of the " B " casual labourers and that of the extra casual labourers were identical. Buckley, L.J., said, at pp. 124, 125 :

> In my judgment there has been misdirection. The county court judge has directed himself that the " B " labourers and " extra casual " labourers are in the same grade. This, I think, is wrong in law. The words of the Act are " a person in the same grade employed at the same work." These two classes of persons were employed at the same work but not in the same grade. I may picture the two classes of labourers as standing on a staircase, and the question is whether the " B " labourer and the " extra casual " labourer stood on the same step or whether the one stood a step above the other. The " B " labourer was a person who had a ticket which entitled him to be called on before the " extra casual " labourer. The latter class got no work until the former class were exhausted. This was, in my judgment, a difference of grade. The " B " labourer enjoyed an advantage personal to himself which gave him a claim to employment before the " extra casual " labourer had a chance. The " B " labourer was of a grade superior to that of the " extra casual " labourer. If the " extra casual " labourer so conducted himself as that he acquired a registered ticket and became a " B " labourer he would have changed his grade.

In the same case, HAMILTON, L.J., said, at pp. 128, 129 :

> The legal meaning of the word " grade " is a matter of law ; the tests by which the existence of a grade may be ascertained are matters of law ; but whether a grade exists or not is a question of fact in each case. Grade or no grade does not depend on the arbitrary nomenclature of single employers apart from all other circumstances, but there may be cases where the classification adopted by a single employer, even among men whose actual work is similar, may amount to a graduation of the men in regard to conditions and regularity of employment and rates of pay so widespread and so distinct as to come within the term " grade " as used in the Act, the similarity of the work and the identity of their generic name notwithstanding.

Apply the passages I have read to the present case. The non-resident nurse-attendants were formerly classified by the corporation in four categories, but, since the adoption of the report already mentioned, they have been classified in three categories. Each category is paid a fixed weekly wage, but the amount of that wage varies with the length of experience. Any person cognisant of the corporation classification can say at once either into which category a non-resident nurse-attendant is to be placed if he is told what her fixed weekly wage is or what her fixed weekly wage is if he is told what length of experience she has had. Suppose that a nurse-attendant was injured in the first week of her employment in such circumstances as would entitle her to receive compensation under the Act, and that (to use the words of the proviso to sect. 10 (1)) by reason of the shortness of the time during which she had been in the employment of the corporation, it was impracticable at the date of the accident to compute the rate of remuneration, and, therefore, that it was necessary to have regard to :

> . . . the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the [corporation] . . .

It would be plain that one could not select any non-resident nurse-attendant without regard to the corporation's classification. It would be necessary to ascertain into which category the injured nurse fell, either by reference to her experience or by reference to the fixed weekly wage which the corporation had agreed to pay, and was in fact paying, to her. In the light of the authorities to which I have referred, I think that, although the work done by all non-resident nurse-attendants may be the same—there is no direct evidence on this point—yet the facts that they are paid a fixed weekly wage which varies according to the length of experience and that the Sheffield Corporation has itself made a classification of such nurses are sufficient to amount to a gradation of the non-resident nurse-attendants in its employment by reference to their experience and rates of pay so distinct as to constitute separate grades in the sense in which that word is used in the Act, notwithstanding, to use the words of HAMILTON, L.J., in *Barnett's* case (1), at p 129, the similarity of the work and the identity of their generic name. It is for these reasons that I think the appeal should be allowed. The award must be set aside, with a direction that an award be made in favour of the appellant ordering the Sheffield Corporation to pay to her the sum of £1 4*s.* 1*d.* per week during the period of total incapacity, credit being given for the amounts already paid. The Sheffield Corporation must pay to the appellant her costs of this appeal and of the arbitration.

Appeal allowed with costs in both courts. Leave to appeal to the House of Lords.

Solicitors: *W. H. Thompson* (for the appellant); *Sharpe, Pritchard & Co.*, agents for *E. B. Gibson*, Town Clerk, Sheffield (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

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NELSON *v.* ADAMSON.

[KING'S BENCH DIVISION (Lawrence, J.), **April 8, 1941.**]

Income Tax—Life tenant—Residuary estate subject to annuity—Dominion "securities"—Dominion "stocks, shares and rents"—Dominion "possessions"—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case IV, r.* 1, *Case V, rr.* 1, 2.

By his will an Australian appointed three Australians as his executors and trustees, and left the residue of his estate in trust for his granddaughter, the appellant, for life, subject to the payment thereout of an annuity and of the expenses of administration. He expressly declared in the will that it was to take effect according to English law. He died in 1912, at which time he possessed considerable property in Australia. The appellant resided in England until Mar. 10, 1936, at which time the annuitant was still living. The appellant was assessed under the Income Tax Act, 1918, Sched. D, Case IV. r. 1, Case V, r. 1, for the years ending Apr. 5, 1935, and Apr. 5, 1936, in respect of her Australian income, it being contended that such income was derived from securities and from stocks, shares and rents, and was, therefore, liable to tax whether or not it was received in England. The appellant, on the other hand, maintained that the income was derived from a possession within the meaning of Sched. D, Case V, r. 2, and that, therefore, she was liable to tax only on such income as was actually received in England:—

HELD: the fact that the income from the trust fund was subject, *inter alia*, to the payment of an annuity did not make it a possession, and, accordingly, the appellant was rightly assessed.

[**EDITORIAL NOTE.** This case deals with a point of some difficulty. *Baker* v. *Archer-Shee* (1), which is here followed, concerned the case of a beneficiary entitled to the whole income of a trust fund. Doubts have been expressed as to whether the principle in that case would apply where the income of the trust fund was apportioned between several beneficiaries, but it is held that no substantial distinction can be drawn between the two cases.

AS TO INCOME FROM SHARES IN FOREIGN COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 198, 199, para. 408; and FOR CASES, see DIGEST, Vol. 28, pp. 79-81, Nos. 433-450.]

Cases referred to:

(1) *Baker* v. *Archer-Shee*, [1927] A.C. 844; Digest Supp.; 96 L.J.K.B. 803; 137 L.T. 762; *revsg.* S.C. *sub nom. Shee* v. *Baker*, [1927] 1 K.B. 109; *sub nom. Archer-Shee* v. *Baker*, 11 Tax Cas. 749; *subsequent proceedings* (1928), 15 Tax Cas. 1.

(2) *Murray* v. *Inland Revenue Comrs.* (1926), 11 Tax Cas. 133; Digest Supp.
(3) *MacFarlane v. Inland Revenue Comrs.*, [1929] S.C. (Ct. of Sess.) 453; Digest Supp.; 14 Tax Cas. 532.
(4) *Inland Revenue Comrs.* v. *Crawshay* (1935), 153 L.T. 457; Digest Supp.; 19 Tax Cas. 715.
(5) *Reid's Trustees* v. *Inland Revenue Comrs.*, [1929] S.C. 439; Digest Supp.; 14 Tax Cas. 512.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. John Ettershank, of East Lodden Estate, in the state of Victoria, Australia, died on July 8, 1912, possessed of considerable property in Australia. By his will, dated July 2, 1912, and made in England, the testator, after appointing three Australian residents to be executors and trustees, made the following dispositions, *inter alia*:

> (2) I bequeath to my niece Agnes McDonald Ettershank now of Adelaide House No. 8 Mount Stuart Road, Rothesay Scotland if she shall be a spinster at my death an annuity of £150 during her life or until she shall marry such annuity to commence from my death and to be payable by equal half-yearly payments of which the first shall be made at the expiration of 6 calendar months after my death. (6) I devise and bequeath all my real and personal estate whatsoever and wheresoever (including all property whether real or personal over which I may have any general power of appointment or disposition by will) unto the trustees hereby appointed upon trust that my trustees shall sell call in and convert into money the same and shall out of the moneys arising thereby or otherwise forming part of my estate pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil thereto and make provision for the payment of any annuities so bequeathed and the death duties on any legacies or annuities or gifts bequeathed free of death duties or deductions for death duties and shall invest the residue of such moneys in the names of my trustees in any of the modes of investment hereinafter authorised with power for my trustees from time to time at their discretion to vary and transpose such investments or any of them into or for any other or others within the range so authorised. (7) My trustees shall stand possessed of the said residuary moneys and of the investments for the time being representing the same (hereinafter call "my settled residue") upon trust to pay the income of my settled residue to my granddaughter Betty Jane Chew Hooper during her life and so that during any coverture the same shall be for her separate use without power of anticipation . . . (17) My trustees may retain out of the annual income of my estate in every year commencing from my death and while the trusts hereof shall continue for their own use and benefit (free of all death duties or deductions for death duties) and in default of agreement to the contrary shall divide the same equally between them a sum equivalent to 5 per cent. of the net amount of the income distributable during that year under the provisions of this my will subject to their discharging out of the sum so retained all the expenses of and incidental to keeping and entering the accounts of my estate and the collecting and distribution of the income thereof. (19) I declare that my will shall be construed and take effect according to the law of England and the rights of all persons claiming or to claim hereunder shall be regulated in all respects by the law of England.

The will was proved in Australia by the executors therein named on Sept. 13, 1913. The appellant attained the age of 21 years on May 13, 1931, and was resident in the United Kingdom until Mar. 10, 1936, when she left to reside in India. The annuitant, referred to in cl. (2) of the will, was still living at the time of these proceedings, and no appropriation out of the residuary estate to meet the annuity had been made. The appellant was assessed to income tax on the footing that the income in respect of her share in the residuary estate was subject to income tax in England whether or not that income was remitted to England. From these assessments she appealed to the commissioners.

The contentions on behalf of the appellant were as follows :

(1) Under English law so far as concerns her life interest in the settled property, she was not entitled to the income from any specific securities comprised in the residuary estate but that her only right was a right in equity to enforce the trust and compel the trustees to discharge it ; (2) The decision in *Baker* v. *Archer-Shee* (1) is not an authority against the contention of the appellant, since in that case, there was only one income beneficiary who dominated the situation with the power of choice of the trustees and control of investment and re-investment. In the present case there is an annuitant with a prior right to income ; a gift out of the annual income of the estate, during the continuation of the trusts, to the trustees for their own use and benefit, subject to certain obligations and active duties on the part of the trustees as to investment and administration over which the appellant has no power of discretion or control ; (3) The opinions of the majority in the House of Lords in *Baker* v. *Archer-Shee* (1) do not support the contention of the Crown in the present case. In fact Lord Carson (one of the three learned Law Lords who constituted the majority) expressly stated, at p. 869, that " . . . had the share to which Lady Archer-Shee was entitled been a proportion only of the income or profits of the residue other questions would no doubt arise " ; (4) The opinion of Lord Sands in *Reids' Trustees* v. *Inland Revenue Comrs.* (5), at p. 529, with reference to *Baker* v. *Archer-Shee* (0) is correct, namely, " The *dicta* which might be founded upon . . . as indicating that a trust may be regarded as a mere agency or conduit pipe are similar, viz. :—where there is one beneficiary and the estate is already realised and duly invested." (5) The appellant was assessable under Sched. D, Case V, r. 2, in respect of her life interest arising from the residuary estate.

The contentions on behalf of the respondent were as follows :

. . . the income arising from the securities comprised in the residuary estate was the income of the appellant and was chargeable to income tax under Sched. D, Case IV, r. 1, Case V, r. 1, whether remitted to this country or not, subject to a deduction for the annuity and trustees' remuneration.

The commissioners dismissed the appeal and the taxpayer appealed.

Cyril King, K.C., and *J. H. Bowe* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondent.

Lawrence, J. : The question on this appeal is whether the appellant is in receipt of income arising from securities, stocks and shares, assessable under the Income Tax Act, 1918, Sched. D, Case IV, r. 1, Case V, r. 1, or from a possession out of the United Kingdom, assessable under Case V, r. 2.

The material facts are that the appellant, who is resident in the United Kingdom, is life tenant under an Australian will under which the estate was bequeathed on trust to pay an annuity to another relative and the residue to her for life. The trustees have made no appropriation for the annuity, and are entitled, under the terms of the will, to a percentage on the net income for their services. The special commissioners have decided that *Baker* v. *Archer-Shee* (1) governs the present case, and that the income of the appellant falls within Case IV, r. 1, and Case V, r. 1.

The main argument for the appellant is that *Baker* v. *Archer-Shee* (1) related to a sole beneficiary, and is inapplicable to a trust under which there is an annuitant who has a prior right derived from the will to her annuity, that the basis of that decision was that the beneficiary had an equitable title to the very dividends on the stocks and shares, that the deduction of the expenses of the trustees then in question was conceded by the Crown, and that the beneficiary's only title where there is an annuity is to the residue. It is also argued that *Baker* v. *Archer-Shee* (1) is distinguishable because, in the present case, the trustees were appointed and remunerated under the will, and not by the appellant. Reliance was also placed upon *Murray* v. *Inland Revenue Comrs.* (2), where it was held in the Court of Session that a liferenter could not be treated, for the purposes of a claim to repayment of income tax in respect of personal allowance, as having an income which included expenses of trustees' appointed by the will, upon *MacFarlane* v. *Inland Revenue Comrs.* (3), where it was held that trustees' expenses of management could not be added to the net income for the purposes of a claim under the Finance Act, 1920, s. 24, and upon *Inland Revenue Comrs.* v. *Crawshay* (4), where it was held that an annuitant and a beneficiary of part of the residue were to be treated as rateably entitled to the income from stocks free of income tax. These cases do not appear to me very close to the present, but *Inland Revenue Comrs.* v. *Crawshay* (4) seems to me to be more in the Crown's favour than in the appellant's.

The Attorney-General, on the other hand, contends that the annuity and remuneration here in question are charged upon the residuary income of the appellant, and that her income arises none the less from securities, stocks and shares, and that the opinion of Lord Wrenbury in *Baker* v. *Archer Shee* (1) is just as applicable to the annuity and remuneration in question as to the expenses there dealt with.

In *Baker* v. *Archer-Shee* (1), it was held that the interposition of a trustee does not prevent the income of the *cestui que trust* arising, within the meaning of the Income Tax Acts, from the stocks and shares held by the trustee, and the question is whether the further interposition of an annuitant makes any difference. Does the income which the *cestui que trust* receives arise any more from the trust than it does when there is no annuitant ? It arises from the trust then in the sense that it belongs at law to the trustee, and is payable by him, and that the machinery of the trust is an essential part of the testator's intention. Is it true to say that the income arises from a possession when there is an annuitant or two beneficiaries, but to say that it comes from stocks and shares when there is a sole beneficiary ? Why is a trust fund a possession when there is an annuity charged on it and not a possession when there is not ? I have come to the conclusion that the decision of the special commissioners is right, and that the residue still arises from the stocks and shares within the meaning of the Income Tax Acts, and no more arises from the trust than it does in the case where there is no annuity. I do not think that any such fine distinction as that suggested by the appellant exists in the contrast drawn in the Income Tax Act between income arising from possessions and income arising from stocks and shares. The appeal is, therefore, dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Waterhouse & Co.* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

Re BELBRIDGE PROPERTY TRUST, LTD., SWALE ESTATES, LTD. *v.* BELBRIDGE PROPERTY TRUST, LTD.

[Chancery Division (Uthwatt, J.), **April 1, 1941.**]

Mortgage—Rights of mortgagee—Appointment of receiver by first mortgagee after appointment of receiver by subsequent mortgagee—Date from which account to commence—where leave under Courts (Emergency Powers) Act, 1939, *necessary.*

Where the receiver of a second mortgagee has been in possession of the mortgaged property, and has to account to the receiver of the first mortgagee who is appointed subsequently, the date from which the second mortgagee's receiver has to account is that on which the summons was issued under the Courts (Emergency Powers) Act, 1939, for leave for the first mortgagee to appoint a receiver, and not the date of the summons asking for the account.

[**EDITORIAL NOTE.** This is purely a practice point, and decides, for the first time, the date from which the order to account should operate. In coming to this decision, the judge has applied the principle adopted in *Re Metropolitan Amalgamated Estates, Ltd., Fairweather* v. *Metropolitan Amalgamated Estates, Ltd.* (1).

As to Right of Receivers appointed by First and Subsequent Incumbrancers, see HALSBURY, Hailsham Edn., Vol. 23, pp. 445, 446, para. 656 ; and for Cases, see DIGEST, Vol. 35, pp. 400, 401, Nos. 1417-1423.]

Case referred to :

(1) *Re Metropolitan Amalgamated Estates, Ltd., Fairweather* v. *Metropolitan Amalgamated Estates, Ltd.*, [1912] 2 Ch. 497 ; 35 Digest 401, *1423 ;* 107 L.T. 545 ; *sub nom. Yorkshire Insurance Co.* v. *Metropolitan Amalgamated Estates, Ltd.*, 81 L.J.Ch. 745.

Procedure Summons to determine from what date the receiver appointed by the debenture holders should give an account to a receiver appointed subsequently by the prior mortgagees. The facts are fully set out in the judgment.

T. D. D. Divine for the applicants.

M. L. Gedge for the first respondents, the debenture holders.

G. D. Johnston for the second respondents, the trustees of the debenture.

Uthwatt, J. : This summons raises a short point which has not been the subject of any judicial decision. The London Assurance Co. are the first mortgagees of certain properties of the defendant company, Belbridge Property Trust, Ltd. That company issued certain debentures which charged these properties as well as certain other properties and stock to which they were entitled. On Oct. 25, 1940, proceedings were commenced by the debenture holders, and Sir William McLintock was appointed receiver. On Nov. 20, 1940, the London Assurance Co. gave notice that they intended to appoint a receiver. Following that, they took the necessary steps under the Courts (Emergency Powers) Act, 1939, to obtain leave to appoint a receiver. That summons was issued and served on Dec. 5, 1940. The proceedings under the summons were prolonged by the opposition of the company, but eventually an order was made by FARWELL, J., on Jan. 21, 1941, giving leave to proceed, and Herbert Warwick Daw was appointed receiver on Jan. 23. The summons in this action, which was issued on Jan. 30, 1941, asked for an account of the rents and profits in the hands of Sir William McLintock as from Dec. 5, 1940. The question I have to decide is whether Sir William McLintock should account for the rents as from Dec. 5, 1940, when the summons under the Courts (Emergency Powers) Act, 1939, was issued, or as from Jan. 30, 1941, when the summons in this action was taken out.

It appears to me that the principle established by *Re Metropolitan Amalgamated Estates, Ltd., Fairweather* v. *Metropolitan Amalgamated Estates, Ltd.* (1), is that a first mortgagee desiring to obtain possession of the property in the hands of second mortgagees is not in any way to be prejudiced by the delay in determining his rights. The rule in that case was that the first mortgagee is entitled to an account of the rents from the time when he makes his application in the action. In my view, however, the principle behind it is much wider, and I think that, where the Courts (Emergency Powers) Act, 1939, comes into operation, it is to be treated as merely part of the machinery under which the mortgagee applies to the court for possession. It is clear, therefore, that the rents are accountable as from the date when the summons under the Courts (Emergency Powers) Act, 1939, was issued on Dec. 5, 1940, and not as from Jan. 30, 1941, when the summons in this action was issued.

Solicitors: *Lawrance, Messer & Co.* (for the applicants); *Ashurst, Morris, Crisp & Co.* (for the first respondents); *Linklaters & Paines* (for the second respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

WILKINSON *v.* REA, LTD.

[Court of Appeal (Scott, MacKinnon and Luxmoore, L.JJ.), **March 5, 6, April 8, 1941.**]

Factories and Workshops—Graving dock—Vessel undergoing repair—Interruption of lighting—Occupier—Factories Act, 1937 (*c.* 67), *ss.* 60, 159 (1)—*Shipbuilding Regulations,* 1931 (*S.R. & O.,* 1931, *No.* 133), *reg.* 42 (*a*) (*b*). A

Negligence—Ship in dock—Workmen employed on ship being repaired—Fall into insufficiently-guarded hatch—Lights switched off at request of Board of Trade inspector—Statutory duty of shipowners—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49) *s.* 31 (*h*)—*Factories Act,* 1937 (*c.* 67), *s.* 159 (1)—*Shipbuilding Regulations,* 1931 (*S.R. & O.,* 1931, *No.* 133), *reg.* 42 (*b*). B

On May 5, 1939, W., a workman employed by a firm engaged upon repairs to a ship, was injured through falling into an open hatch. The vessel was in dry dock at the time of the accident, and R. & Co. were engaged in putting coal in a bunker through a hatch. The cover of the hatch had been removed by R. & Co. Just before the accident C occurred, the electric light at the place was switched off at the request of a Board of Trade inspector, who was testing the lighting installation. The foreman of the coaling gang took up a lighted candle and held it so as to throw some light on the uncovered hatchway and attempted to stop the plaintiff, who was coming that way just at that moment. The plaintiff did not realise the nature of the warning thus given to D him, pushed past the foreman and was injured by falling into the open hatch. W. brought an action against R. & Co. to recover damages for injuries caused by their negligence, and he also claimed damages from his employers and from the shipowners for negligence and for breach of statutory duty. The claim based on breach of statutory duty by the employers depended upon whether the employers were occupiers of the dock within the Shipbuilding Regulations, 1931, and E the similar claim against the shipowners on whether they had failed to carry out the duty adequately to light the ship imposed upon them by the Shipbuilding Regulations, 1931, reg. 42 (*b*) :—

Held : (i) R. & Co. were guilty of negligence.

(ii) W. was not guilty of contributory negligence.

(iii) the shipowners were liable for breach of the statutory duty F imposed by the Shipbuilding Regulations, 1931, reg. 42 (*b*).

(iv) the employers were not occupiers within the provisions of the Shipbuilding Regulations, 1931, and were not guilty of breach of statutory duty.

(v) the shipowners were also liable at common law in negligence, and it was no answer to this liability that R. & Co. were independent contractors. G

[**EDITORIAL NOTE.** It will be remembered that the Shipbuilding Regulations, 1931, and the Factories Act, under which they were made, provide no definition of the term "occupier." The consideration of this question is the main point of interest in this case, but the other questions discussed are of considerable importance to those engaged in the repair and loading of ships in dock. H

As to "Occupier," see HALSBURY, Hailsham Edn., Vol. 14, pp. 619-621, para. 1174 ; and for Cases, see DIGEST, Vol. 24, pp. 916-918, Nos. 117-126.]

Cases referred to :

(1) *Smith* v. *Cammell Laird & Co.,* [1940] A.C. 242 ; [1939] 4 All E.R. 381 ; Digest Supp. ; 109 L.J.K.B. 134 ; *revsg.,* [1938] 2 K.B. 700 ; [1938] 3 All E.R. 52 ; 107 L.J.K.B. 529.

(2) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, *208*; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.

(3) *Daniel* v. *Rickett, Cockerell & Co., Ltd., and Raymond*, [1938] 2 K.B. 322; [1938] 2 All E.R. 631; Digest Supp.; 107 L.J.K.B. 589; 159 L.T. 311.

(4) *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; 36 Digest 51, *312*; 4 L.T. 470.

APPEAL by Rea, Ltd. from an order of STABLE, J., sitting at the Liverpool Assizes, dated Oct. 31, 1940. There was also a cross-appeal on the question of costs and a further appeal by the plaintiff as against the other two defendants. The facts are fully set out in the judgment of SCOTT, L.J.

E. G. Hemmerde, K.C., and *E. Wooll* for the appellants.
N. B. Goldie, K.C., and *J. Melville Kennan* for the first respondent.
F. A. Sellers, K.C., and *R. S. Nicklin* for the second respondents.
Wilfrid Clothier, K.C., and *S. Scholefield Allen* for the third respondents.

SCOTT, L.J.: This appeal is from a judgment of STABLE, J., given in an action in which the plaintiff was suing three separate defendants for damages for personal injuries caused by an accident on May 5, 1939, which was alleged to have been brought about by the negligence of the first defendants or by the negligence or breach of statutory duty of the second and third defendants. It will be convenient to consider first the case against the first defendants, who are the main appellants before us.

The plaintiff was a "holder-up" employed by a firm of contractors doing work on the motor vessel Linnell, which belonged to the defendants Lamport & Holt, and which was then lying in the Bidston graving dock at Birkenhead. The accident took place in the ship's galley, which was situate on a deck below the weather deck and extended across the ship from the starboard alleyway to the port alleyway, and was entered by a door from each alleyway. Inside the galley, up against the starboard bulkhead and some 16 ins. aft of the starboard doorway, was a small hatchway or scuttle in the deck, through which, when it was uncovered, coal could be shot down into a small bunker, used as a store for the supply of coal for the cooking-range in the galley. At about 7.30 a.m. on May 5, 1939, men employed by the defendants Rea, Ltd., a company of coal suppliers, were engaged in filling this bunker for the ship's outward voyage. The coal was being carried into the galley through the port doors in bags, and the men had to walk across the galley and tip their bags into the hatchway on the starboard side. A gang foreman, employed by Rea, Ltd., was superintending the operation, the hatch cover then being off. Brown & Co., who were regular contractors for repairs on Lamport & Holt's ships, had been at work for a fortnight on various voyage repairs, including riveting the top of the galley for which purpose they had to take down the electric lighting wires and so on in the galley. However, these repairs had been completed and the lighting of the galley restored to use before May 5, 1939. Brown & Co. were also in attendance upon the surveyor to Lloyds' register, who was surveying, *inter alia*, the electric lighting installation of the ship. For this purpose, he required sections of the lighting system to be switched on and off, a representative of Brown & Co. receiving his orders and transmitting them to the engine room, where the ship's engineers carried them out. This part of the testing necessarily involved turning off the light temporarily in whatever portion of the ship was served by the particular section of the lighting system so switched off. At the moment of the accident, in addition to the coaling, a trivial work of repair was being executed by Brown & Co.'s men in the galley. In the galley there was a scupper in the deck just opposite to, and close to the middle of, the starboard doorway, the after side of which was, as I have said, only 16 ins. from the open hatchway in question. One of Brown & Co.'s plumbers, who was engaged in taking it apart for cleaning, a mere five minutes' job, was kneeling on the deck, with a lighted candle by him. His mate was standing by, just on the other side of the door opening, in the alleyway doing nothing. In the alleyway, there were no lights on, but it was not quite dark, as some daylight reached it. At this moment, the electric lights in the galley went off, no doubt because that section had been switched off at the request of the surveyor. The foreman of the coaling gang, who was standing between the door and the hatchway, realised at once that the uncovered hatchway was, in the comparative dark, a source of great danger, lit a candle from the plumber's candle, took the lighted candle in his left hand, and, with his back to the alleyway, stretched out his left arm, presumably to throw the light down on to the dark opening into the bunker. Just as the lights went off, the plaintiff came along the alleyway for the purpose of getting something he wanted for his work, which was lying in a place which he had to approach by way of the starboard alleyway and the galley. The foreman heard him coming, called out to him, and, with his left arm still stretching out, took hold of the jamb of the doorway with his left hand (which was still holding the candle) for the purpose of preventing the newcomer from stepping unawares into the open bunker. The plaintiff, however, not realising that the foreman was trying to stop him, pushed by, fell in, and hurt himself seriously.

The judge held that it was the duty of Rea's foreman, who was in control of the dangerous invisible opening, to take "adequate" action to prevent the plaintiff from falling in, and that, as his action was not adequate, Rea, Ltd. had not discharged the burden of proof which rested on them, and, therefore, were guilty of negligence. The only possible answer, the judge said, was contributory negligence, and of that he held the plaintiff guiltless, in the circumstances. He accordingly gave the plaintiff damages against Rea, Ltd. for common law negligence. On the amount, there is no dispute before us. In my view, the judge slightly overstated the measure of their duty, which I think was only to take all reasonably practicable steps to warn and protect, but, even so, I think that in the result he was right. The foreman heard the plaintiff coming along the alleyway, and he called out a warning just because he realised how instant the danger was, but he did not—either by himself or with the help of the plumber—take the obvious step of standing right in the doorway with the candle held out in the face of the person who seemed to be coming in. It would have been easy to do so. It was the sensible thing to do, and I think that he ought to have done it. As regards the alleged contributory negligence, I agree with the judge's view that the plaintiff did not realise that an effort was being made to warn and stop him, and consequently could not be blamed. The judge accordingly gave judgment for the plaintiff against Rea, Ltd. for £349 damages with costs.

The case against the other two defendants was primarily for breach of statutory duties under the Factories Act, 1937, but there were alternative claims for negligence. The only case in fact urged in respect of the former was that those defendants, or one or other of them, had broken the Shipbuilding Regulations, 1931, reg. 42 (*a*), (*b*), made by the Secretary of State under the Factory and Workshops Act, 1901, s. 79, and continued under the Factories Act, 1937, s. 159 (1), and thereby given the statutory force of sect. 60 of that Act. The phrase "public dry dock" is there defined as meaning "any dry dock which is available for hire." The Bidston graving dock was admittedly such a dock. Under the head of "Duties," it is there provided as follows:

> It shall be the duty of the occupier to comply with Parts I to VIII of these regulations. Provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with his agent to execute the work of repair, shall be deemed to be the occupier for the purpose of Parts I to VIII and it shall be his duty to comply with the said parts, except as follows . . . . (*c*) Where the shipowner provides the lighting on board the ship it shall be the duty of the shipowner, master, or officer in charge, to comply with reg. 42 (*b*) so far as regards the lighting on the ship which he has undertaken to provide.

Part V deals with "Lighting," and reg. 42 (*a*) provides as follows:

> All parts of a ship where work is being carried on shall be efficiently lighted.

Reg. 42 (*b*), so far as material, provides as follows:

> All approaches to such parts and to places to which a person employed may be required to proceed in the course of his employment shall be adequately lighted and, in particular, lights shall be provided at all deck and other dangerous openings . . .

It was said on behalf of the plaintiff that Brown & Co. were "contractors for works of repair," and were, therefore, the occupier within the provision about "duties" upon whom the duty of lighting was cast under reg. 42 (*a*). It was also said that, by reason of the exception in the provision under the head of "Duties," Lamport & Holt, Ltd., were the occupiers, and were responsible under reg. 42 (*b*).

The judge expressed the view about both these defendants that it was:

> . . . really unnecessary to consider their liability except for the purpose of considering the question of costs.

However, he did in fact discuss it and pronounce upon it. He held that, "on whoever the [lighting] duty was imposed, the duty was performed," and he ordered the plaintiff to pay the costs of both defendants whom he had charged with breach of statutory duty. When counsel for the plaintiff asked that the burden of the two sets of costs should be borne by Rea, Ltd., the judge refused, holding that the plaintiff had acted unreasonably in making the contractor and the shipowners defendants to the action. The ground of his decision was that the lighting system supplied by the shipowners was satisfactory, and that a purely temporary interruption of the current did not constitute a breach of duty under reg. 42 (*b*). He exonerated Brown & Co. under reg. 42 (*a*), because that company could not be " deemed to be the occupier," since it was not " a person who had contracted to repair the ship," for it had contracted to repair only parts of the ship. He further held that the cessation of the lighting was not the cause of the accident, but was only a condition precedent to the negligence of Rea, Ltd. which was the sole cause of the accident. This decision was one of fact, but I disagree with it.

Upon the plaintiff's claims against both these defendants on the ground of common law negligence, the judge held that the plaintiff had not established his case against either. I agree with his decision as regards Brown & Co., but the case against Lamport & Holt cannot be so disposed of. However, it will be easier to discuss it after considering the issues of statutory liability. The only real case on that head made at the trial and before us was based on breaches of the Shipbuilding Regulations, 1931, reg. 42 (*a*), (*b*). The shipowners were in fact providing the lighting on board the ship, and undoubtedly had expressly or impliedly undertaken with Brown & Co., their contractor for repairs, to make that provision, so as to bring them within exception (*c*) of the proviso about " Duties," and that undertaking must clearly have meant that the lighting would be continuous throughout the daily period of the contractor's work. Reg. 42 (*b*) imposed on the shipowners the duty of lighting " all places to which an employee of the contractor might be required to proceed in the course of his employment." On the evidence, the galley was a place to which the plaintiff was required to proceed, and the cessation of light was in part the cause of the accident. The only question, therefore, is whether the shipowners were entitled to turn off the current at that place without warning and without providing other light. If the duty was absolute, switching off the section was, in the circumstances proved in evidence, a breach. It was obviously the duty of the shipowners to have the illumination on at all material times, and, as the facts of the case show, it was potentially most dangerous suddenly to shut off the lights without warning. It made the means of access to the galley unsafe within reg. 1, which provides as follows :

> Safe means of access shall be provided to all parts of the ship to which persons employed may be required to proceed in the course of their employment.

It rendered futile reg. 10, which provides as follows :

> All openings in decks and tank tops shall be securely protected. Such protection shall be maintained in position and when necessarily removed in the course of work shall be replaced as soon as practicable.

In my opinion, reg. 42 (*b*) is plainly absolute. The principles of construction which lead to such an interpretation were explained very clearly by Lord Atkin in *Smith* v. *Cammell Laird & Co.* (1), at pp. 258, 259 ([1939] 4 All E.R., at pp. 390, 391), and apply to reg. 42 (*b*). The cross-appeal on statutory liability must, therefore, be allowed against Lamport & Holt, and judgment must be entered for the plaintiff against them with costs here and below.

The cross-appeal against Brown & Co. stands on a different footing. That company was clearly not the "occupier" of the "factory" for the purpose of reg. 42 (*b*), but it is necessary to consider reg. 42 (*a*), which apparently does not apply to the shipowner. It is not necessary to discuss the view of the judge that a repairs contractor is not to be deemed the occupier unless he is contractor for the whole ship, nor the question whether, if he is the contractor for a defined part or place of or in the ship, he may not come under the duties of an occupier of that part or place, or whether there can in any circumstances be two or more occupiers of the same part or place. Brown & Co. were in fact the only contractors doing repairs in the galley, and what they were doing there was a trivial and localised job, for which the plumber's candle afforded sufficient light. It would obviously be absurd to treat such contractors as responsible for any general lighting, which was *ex hypothesi* all being done by the shipowners. That company, therefore, were rightly entitled to judgment on the issue of reg. 42 (*a*).

In my opinion, there can be no doubt that the main responsibility for the accident to the plaintiff rests on Rea, Ltd. Until the extinguishment of the light, there was no danger, for everybody entering a ship under repairs in graving dock preparatory to an outward voyage knows that there may be many dangers lurking in his path, which, in the ordinary case of a person conversant with what is to be expected, can easily be avoided. When the lights went out, however, there was, as the foreman at once realised, a sudden danger, which the sound of steps coming near along the starboard alley made imminent. From the points of view both of cause and of blame, the failure of the foreman to prevent the plaintiff from entering the galley in those circumstances constituted the main act of negligence for which Rea, Ltd., were held liable. Nevertheless, the shipowners had failed in their duty of adequate lighting, and had brought about the state of danger which was a part cause of the accident. Can it be said that they owed no duty at common law to persons in the position of the plaintiff who they ought to have known might be "required" to pass through the galley? I do not think that they can be exonerated altogether. They must bear some part of the blame, because they allowed the temporary switching off of lights, when ordered by the surveyor to Lloyd's register, without any arrangement for warning, when they knew that to do so might cause danger to someone, although in point of degree their negligence was, in my opinion, much less than that of Rea, Ltd.

On the appeal, it remains to deal with the judge's refusal to put the burden of Brown & Co,'s costs, which he had ordered the plaintiff to pay, on to the back of Rea, Ltd. I think that he was right, and that there was not any more shadow of justification for joining Brown & Co. as defendants on the ground of common law negligence than there was for doing so on the ground of breach of statutory duty. In the result, I think that counsel for the plaintiff ought to have read the regulations more carefully, and realised that it would be unreasonable to make that company a defendant on either cause of action. I have expressed this opinion about costs on the hypothesis that that question was open to the plaintiff on his cross-appeal in the absence of leave to appeal, but it must not be assumed that the hypothesis has any justification. In the result, the appeal of Rea, Ltd., is dismissed with costs, and the cross-appeal of the plaintiff is allowed against Lamport & Holt *prima facie* with costs here and below, but is dismissed with costs as against Brown & Co. We make no order for payment by either of the unsuccessful defendants of the costs payable by the plaintiff to Brown & Co.

MacKinnon, L.J.: I have had the pleasure of reading the judgments written by Scott and Luxmoore, L.JJ., in this case, and, being constitutionally less industrious than they are, I content myself with saying that I agree with their reasons and with the order they enunciate.

Luxmoore, L.J.: On May 5, 1939, John Wilkinson, a workman in the employment of Messrs. A. & R. Brown, Ltd. (hereinafter called Browns), sustained a serious injury through falling into an open hatch in the galley of the motor vessel Linnell owned by Messrs. Lamport & Holt, Ltd. (hereinafter called the owners). At the date of the accident, the vessel was in a public dry dock called the Bidston graving dock at Birkenhead undergoing repairs, some of which, and in particular those connected with the electric lighting and power installation in the vessel, were being carried out by Browns. At the time of the accident, Messrs. Rea, Ltd. (hereinafter called the coal merchants), were engaged in putting coal into a small bunker under the galley through the hatch into which Wilkinson fell. The cover of the hatch had been removed by the coal merchants, and was off at the time of the accident to enable the coal to be discharged into the bunker. Just before the accident occurred, the electric lighting in the galley was switched off. This was done at the request of the Board of Trade inspector, who was testing the lighting installation. Two other workmen in Browns' employment were at this time engaged upon a small repairing job at the entrance of the galley, and had a lighted candle to assist them in their work, which had nothing to do with the coaling operations. When the electric light was switched off, the foreman employed by the coal merchants lit another candle from the one in use by the two workmen, and, holding this lighted candle in his left hand, stood facing the open hatch with his left arm extended, in order (as he said in his evidence) to prevent any person from approaching the hatch. Wilkinson came into the galley to fetch some tools or material which he had left there on the previous evening.

He paid no attention to the foreman's outstretched arm, and pushed past it. In doing so, he fell into the open hatch and sustained the injuries of which he complained.

Wilkinson subsequently brought an action against the coal merchants, A Browns and the owners. His cause of action against the coal merchants was based solely on common law negligence, while that against Browns and the owners respectively was based on breach of statutory duty as well as on common law negligence. The action was heard by STABLE, J., at the Liverpool Assizes. The judge found that the existence of the B open hatch in the galley at the time of the accident constituted a trap, and that the burden was on the coal merchants to prove that they provided adequate protection against any accident happening to Wilkinson by reason of its existence. He held that the coal merchants had not discharged the burden of proving that they brought to Wilkinson's C knowledge the fact that a peril existed, and refused to find that there was any contributory negligence on Wilkinson's part, and, therefore, he held that the action against the coal merchants succeeded, and fixed the damages suffered by Wilkinson at £349. Of this, £99 represented special damage and £250 general damages. He accordingly ordered the D coal merchants to pay this sum to Wilkinson, together with his costs of the action. He further held that neither Browns nor the owners had committed a breach of any statutory duty, and dismissed the action against them without considering the question of whether or not Browns or the owners were in any way liable to Wilkinson at common law. E Further, the judge, in the exercise of his discretion, ordered the plaintiff to pay Browns' and the owners' costs of the action without any right to recover such costs against the coal merchants.

The coal merchants have appealed against the judgment in favour of Wilkinson, on the ground that the evidence established that they had F not been guilty of any negligence with regard to the plaintiff, and that in any event the plaintiff was guilty of contributory negligence. They do not challenge the amount of damages. Wilkinson gave notice of cross-appeal against that part of the order which directed him to pay the costs of Browns and the owners without any right to recover them from the G coal merchants. He also appealed against the order dismissing his action against Browns and the owners respectively. The coal merchants made no suggestion, either in the court below or in this court, that Browns or the owners were under any liability to Wilkinson. Two points were raised by the coal merchants in their appeal. They contended (i) that the H evidence established beyond controversy that their foreman was not guilty of any negligence, and (ii) that Wilkinson was guilty of contributory negligence. In each case, the question to be considered is one of fact. In my judgment, after a careful consideration of the evidence, there is no substantial ground for interfering with the findings of the judge on either point, and, consequently, the coal merchants' appeal fails, and must be dismissed with costs.

It will be convenient, I think, to deal with Wilkinson's appeal against the order dismissing his action against Browns and the owners before dealing with his cross-appeal with regard to Browns' and the owners' costs. As I have already said, Wilkinson seeks to make Browns and the owners liable because each of them was under a statutory duty to him, and also because each of them was guilty of negligence at common law. I will first deal with the claim against Browns. At the time when the accident happened, two of Browns' workmen were engaged on a small repairing job in the galley. This had no relation whatever to the coaling operations, and I am quite unable to understand how, in any circumstances, Browns can have been guilty of any negligence towards Wilkinson at common law.

The next question is whether or not Browns were under any statutory duty towards Wilkinson. The case against Browns on this head is based on the Shipbuilding Regulations, 1931, made under the Factory and Workshops Act, 1901, sect. 79, in respect of the construction and repair of ships in shipbuilding yards. These regulations were at the time of the accident, and still are, in force under the provisions of the Factories Act, 1937, s. 159. Shipbuilding yards are defined in the Factory and Workshops Act, 1901, Sched. VI, Part. II (25), as " any premises in which any ships, boats or vessels used in navigation are made, finished or repaired." Presumably this definition is still applicable to the order, although the Factory and Workshops Act, 1901, has been repealed by the Factories Act, 1937. The order provides that it shall be the duty of the occupier to comply with Parts I to VIII of these regulations, provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with the agent to execute the work of repair shall be deemed to be the occupier for the purposes of Parts I to VIII, and it shall be his duty to comply with those parts, with certain exceptions. It is unnecessary to refer specifically to any of these exceptions, or to any of the regulations, unless, on the true construction of the words I have quoted from the regulations, Browns are to be deemed to be the occupiers. There is no definition of the word " occupier " in the regulations or the Act, nor is there to be found in the regulations any express statement of the nature of what the occupier is to be deemed to occupy. The solution of the difficulty is to be found in *Smith* v. *Cammell Laird & Co.* (1) where Lord Atkin said, at p. 256 ([1939] 4 All E.R., at p. 388) :

> It appears to me that if one seeks to inquire into the meaning of the word " occupier " in the sentence stating that it is the duty of the occupier to comply with Parts I to VIII by asking occupier of what, the only answer can be occupier of that which alone has been previously mentioned in the regulations as capable of being occupied, namely, the shipbuilding yard which is the factory within which the regulations are to operate. It is not the occupier of the " staging or that part of the ship " " such part of the ship as was necessary for the work which had to be done " " the place where the accident occurred " " the *locus* where the staging stood " : nor is the " occupier " the right word to describe the person controlling the work in doing which the accident happened or the person using the machinery which gives rise to the accident.

In *Smith* v. *Cammell Laird & Co.* (1), the person held to be the occupier was the builder of a ship in a shipbuilding yard, and he was not a person deemed to be the occupier because he had agreed with the owner to repair a ship in a public dry dock. In the present case, Browns had not agreed with the owners to repair the motor vessel Linnell in the Bidston dry dock. They had agreed to do only certain parts of the repair work which was being carried out on the ship while it was in that dock. It is impossible, therefore, in my judgment, to hold that Browns were to be deemed to be the occupiers of the dry dock at the time when the accident occurred, and they cannot, therefore, have been under any statutory duty to Wilkinson. It follows, in my judgment, that STABLE, J., was right in dismissing the action as against Browns.

With regard to the action against the owners, it will be convenient to consider first whether or not they were under any statutory duty towards Wilkinson under the regulations. The regulations do not contemplate that the owners could be occupiers under the words " It shall be the duty of the occupier to comply with Parts I to VIII of these regulations," for it has been held in *Smith* v. *Cammell Laird & Co.* (1) that, on the true construction of the regulations, the subject-matter of the occupation is a shipbuilding yard. By the definition already referred to, a shipbuilding yard includes a dry dock where repairs are being done. It was not argued, however, that the owners were liable as occupiers of the dry dock. It was contended that they were liable under the express words of reg. 42 (*b*) :

> All approaches to such parts [parts of a ship where work is being carried on] and to places to which a person employed may be required to proceed in the course of his employment shall be adequately lighted and in particular lights shall be provided at all deck and other dangerous openings and all ladders and gangways.

The duty under this regulation is imposed on the owners by sub-clause (*c*) of the proviso to the clauses contained in that part of the regulations included under the heading " Duties." Reg. 42 (*c*) provides as follows :

> Where the shipowner provides the lighting on board the ship it shall be the duty of the shipowner . . . to comply with reg. 42 (*b*) so far as regards the lighting of the ship he has undertaken to provide.

In the present case, the owners admittedly provided the lighting on board the vessel. The question then arises whether the duty imposed is absolute or whether it is to be construed as limited to a duty to take reasonable care to keep lighted the parts specifically mentioned. I can see no reason for not giving the words of reg. 42 (*b*) their ordinary meaning. The words are peremptory. The particular approaches mentioned " shall be adequately lighted." That must necessarily be at all times when they are being, or may be, used. On this construction, there can be no doubt that the owners' duty to light is absolute. The switching off of the light and its consequent extinguishment at the time when the accident occurred left inadequately lighted an approach to a place to which Wilkinson was required to proceed in the course of his employment and, consequently, there was a breach of the owners' statutory duty, and for this breach of duty they are liable.

This is sufficient to dispose of the appeal against the owners, but, as the matter was argued, I think it right to decide the question whether the owners were also under any common law liability. The first material fact to be borne in mind is that the owners were at all material times in control and occupation of a ship having in the floor of the galley a hatch, with a cover which, if it were removed, would constitute an unusual danger. In such circumstances, the duty of an occupier towards a person who, like Wilkinson, was on the vessel engaged upon lawful business in the course of fulfilling a contract between Browns, his employers and the owners, is this. If the person uses reasonable care for his own safety, he is entitled to expect that the owners, on their part, will use reasonable care to prevent damage from unusual danger which they know, or ought to know: *Indermaur* v. *Dames* (2), especially the remarks of WILLES, J., at p. 288. It is not suggested that the owners gave Wilkinson any warning of the danger, or took any special steps to guard against it. Therefore, the question whether or not the owners took reasonable care for Wilkinson's safety and whether or not Wilkinson was guilty of contributory negligence are matters of fact to be determined by the judge, as he was sitting without a jury. There could be no question that the owners would have been liable in the present case if they had themselves been carrying out the work of delivering coal through the uncovered hatch into the bunker below without warning Wilkinson of the danger. They seek to avoid liability, however, on the ground that the coal merchants were independent contractors whom they reasonably believed to be competent to carry out their work properly. POLLOCK ON TORTS, 13th Edn., p. 530, states as follows:

> I can see no reason for thinking that the duty declared in *Indermaur* v. *Dames* (2) can be escaped by delegating its performance to an independent contractor. It is not stated in the terms which WILLES, J., would have used if he had meant to add to the limitations he so carefully laid down.

In *Daniel* v. *Rickett, Cockerell & Co., Ltd., and Raymond* (3), HILBERY, J., held the occupier liable for injury suffered by the plaintiff through an opening in the pavement opposite the occupier's house caused by the lifting of a cellar-flap for the purpose of delivering coals into the occupier's cellar, and in so doing he followed the decision in *Pickard* v. *Smith* (4), where WILLIAMS, J., who delivered the judgment of the Court of Common Pleas, said, at p. 480:

> . . . the defendant (that is the occupier) is not absolved by the fact of the coal merchant being employed, and of the injury being the consequence of his immediate act. Unquestionably, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects

> its fulfilment, whereby an injury is occasioned. Now, in the present case, the defendant employed the coal merchant to open the trap in order to put in the coals, and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it furnishes no excuse, either in good sense or law.

It seems to me that this passage applies to the present case. The owners employed the coal merchants to open the hatch cover so that the coals to be supplied might be delivered into the bunker. The act of taking off the cover caused danger, and the owners were bound to take reasonable means to prevent mischief. The owners themselves did nothing. The coal merchants did not do sufficient, and, therefore, the owners remain liable as well as the coal merchants. The plaintiff has succeeded in establishing the liability of the owners as well as that of the coal merchants, and is entitled to a judgment for £349 against each.

No question of indemnity or contribution as between the owners and the coal merchants is raised in the pleadings, and there are no third-party proceedings. Although it may well be that the owners are entitled to some relief as against the coal merchants under the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, that is a matter which cannot be dealt with on this appeal except by agreement. It follows from what I have said that Wilkinson's appeal succeeds as against the owners and the order of STABLE, J., should be varied by making the owners liable with the coal merchants for the payment to the plaintiff of the £349 and the costs of the action. There should be omitted from the order the direction that the plaintiff should pay the costs of the owners.

The only matter which remains to be dealt with is the plaintiff's cross-appeal with regard to the order directing him to pay the costs of Browns and the owners. This appeal is solely concerned with costs, which by law are left to the discretion of the court. No leave to appeal was obtained from the judge, and the appeal is, therefore, incompetent: Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (*h*). In the result, I think that the appeal of the coal merchants should be dismissed with costs. The appeal of the plaintiff against the order of the court below, so far as it relates to the question of liability of Browns and the owners, should be dismissed with costs so far as Browns are concerned, and should be allowed against the owners. The plaintiff must pay Browns' costs of this appeal, while the owners must pay the plaintiff's costs of his appeal so far as they are not increased by the adding of Browns as respondents thereto. The plaintiff must pay the costs of Browns and the owners, of the cross-appeal. The order should provide for the usual set-off.

The court, being asked to deal with the question of contribution, held that the coal contractors, should pay three-fourths and the ship-owners one-fourth of the damages and costs other than the costs of Browns.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Barrell Son & Co.*, Liverpool (for the appellants); *Helder, Roberts, Giles & Co.*, agents for *J. A. Behn, Twyford & Reece*, Liverpool (for the first respondent); *Carpenter & Co.*, agents for *Laces & Co.*, Liverpool (for the second respondents); *Botterell & Roche*, agents for *Weightman, Pedder & Co.*, Liverpool (for the third respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MILLIGAN *v.* MILLIGAN.

[PROBATE DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.), **March 20, 21, April 9, 1941.**]

Divorce—Restitution of conjugal rights—Jurisdiction—" Matrimonial home " —Cessation of cohabitation—Residence within jurisdiction.

The respondent, a senior Army officer, lived with the petitioner at various addresses in England in hotels and furnished houses, but he was not domiciled in England. On obtaining promotion and an appointment, he went to live in an officers' mess. The wife petitioned for restitution of conjugal rights, and the husband entered an appearance under protest, disputing jurisdiction. The registrar directed the trial of the issue of jurisdiction:—

HELD: the court has jurisdiction when there is a matrimonial home within the jurisdiction at the time when cohabitation ceases. The phrase " matrimonial home " extends, in relation to jurisdiction, to the husband's residence in England in such circumstances that any husband similarly circumstanced, and not estranged from his wife, would set up his home in England, and, in the circumstances of this case, the parties had such a home within the jurisdiction.

[**EDITORIAL NOTE** The jurisdiction in cases of this nature is one inherited from the ecclesiastical courts. For this reason it is not concerned with domicil, but depends on the existence of a matrimonial home within the jurisdiction at the time when cohabitation between the parties ceased. In exceptional cases, the occupation of the husband or the wife does not permit the setting up of a home in the normal way and, in such cases, it is sufficient that the parties live together as and when it is reasonable that they should do so.

AS TO JURISDICTION IN MATRIMONIAL PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 691, 692, para. 1027; and FOR CASES, see DIGEST, Vol. 27, pp. 263, 264, Nos. 2317-2325.]

Cases referred to:

(1) *Niboyet* v. *Niboyet* (1878), 4 P.D. 1; 11 Digest 423, *894;* 48 L.J.P. 1; 39 L.T. 486.

(2) *Armytage* v. *Armytage*, [1898] P. 178; 11 Digest 426, *917;* 67 L.J.P. 90; 78 L.T. 689.

(3) *Perrin* v. *Perrin, Powell* v. *Powell*, [1914] P. 135; 27 Digest 393, *3872;* 83 L.J.P. 69; 111 L.T. 335

Petition by a wife for restitution of conjugal rights. The husband entered appearance under protest, disputing jursidiction, and the registrar directed the trial of the issue of jurisdiction. The facts are fully set out in the judgment.

Geoffrey C. Tyndale for the petitioner.
Hon. Victor Russell for the respondent.

Henn Collins, J.: The questions for decision arise upon issues directed to be tried in a wife's suit for restitution of conjugal rights. To that suit the respondent husband entered appearance under protest putting in issue the jurisdiction of the court to entertain the suit. He says that he was not, at the date of the institution of the suit, domiciled in England, and, further, that he had not a matrimonial home in England at the time when the cohabitation ceased. When these issues came on for trial, it was conceded, on the part of the wife, that the respondent was not domiciled in England at the material time. That concession accorded with the proved facts, and I say no more about it.

The matter for decision, therefore, arises wholly upon the second issue, and is whether or not the spouses had a matrimonial home within the jurisdiction, at the time when cohabitation ceased. This is a mixed question of fact and law. What is meant, in relation to the jurisdiction of the court, by the phrase, " a matrimonial home " is a question of law. Whether or not the spouses had such a home when cohabitation ceased is a question of fact, and, before it can be decided, one must ascertain at what date cohabitation ceased. It will be better to state the facts, using neutral terms so far as possible.

The respondent was at all material times an officer in the Royal Artillery. That profession required him to dwell in various places, and his habitat was uncertain in site and duration. Down to the early part of 1937 he was stationed in Ceylon and the petitioner was with him there. In the spring of 1937 the wife returned to England with the son of the marriage. In October the respondent came home on leave and the parties established themselves in a furnished flat in Edinburgh.

While they were still in Edinburgh, the respondent was appointed to a command at Lichfield and they went there. They established themselves first in two bedrooms and a sitting-room at an hotel in Lichfield, where they remained for a couple of months. They then took a furnished house in Lichfield, where they used their own plate and linen, for another two months or so. During that time the respondent was expecting to be seconded for a senior officers' course at Sheerness, and in May he went there to take that course. While he was there, the petitioner, finding the accommodation at the furnished house at Lichfield larger and more expensive than was needed for herself and her son during the husband's absence, returned, with his consent, to the hotel and lived there. There she remained with her son awaiting the conclusion of the respondent's course at Sheerness, and the spouses did not meet, except for one week-end spent at Larkhill, till July 7, when the respondent rejoined his wife at the hotel at Lichfield. They continued there until the end of July, when, as the boy's holidays had begun, and as the respondent's duties still detained him in Lichfield, mother and son left Lichfield on visits to friends and relations. The wife, however, spent the night of Aug. 9 with her husband at Lichfield, where she broke one of her journeys between visits.

Meanwhile, the respondent got an appointment which took him to Pembrokeshire for two or three weeks, and, while he was stationed there, he joined his wife for one night in Dorsetshire, where she was staying. From Pembrokeshire the respondent was recalled to Lichfield, and, while he was there, he received the promotion which he had been expecting and to which the senior officers' course was the preliminary. Early in October he was ordered to Blackdown, and while he was there he lived in the officers' mess. Meanwhile, the petitioner and the son had remained in Dorset, but, upon the respondent being posted to Blackdown, the petitioner went to Camberley with the respondent to look for accommodation in which to re-establish the household, and it was then that the respondent declared his intention of not living with the petitioner again, which intention he admits he formed when he went to Blackdown.

In those circumstances, the first question is when cohabitation ceased. On the one hand, it is said that it ceased either on or about Aug. 9, the last occasion when marital intercourse took place, or the later week-end in Dorsetshire, when there were no signs of unfriendliness, but which was the last occasion on which they were together under one roof. On the other hand, it is said that it did not cease before early October at Camberley, while the respondent was living in the officers' mess at Blackdown, and had no other abode. I think that this latter view is the assumption upon which I must proceed, for I can assign no earlier date with certainty. It is clear, I think, that a state of cohabitation existed down to that date, and that there was a matrimonial home at Lichfield as long as the husband was there. It would not take much to persuade me that it was there that he formed the intention of no longer living with his wife, and that consequently it was there that cohabitation ceased. However, as I have said, I have no certainty of that, and must proceed upon the other footing.

Had the husband a matrimonial home in England, circumstanced as he was, at Blackdown? That must depend upon what is meant by the expression "matrimonial home" in this connection. If it means a dwelling which was being occupied by the spouses when cohabitation ceased, and nothing else, as was contended on the part of the respondent, there was no matrimonial home at Blackdown, for the spouses never lived together there. Have the words, however, no wider meaning in such a connection? Bearing in mind that the petitioner is seeking a remedy for desertion, and that desertion is not from a place, but from a state of things, it would be remarkable if an element unessential to the offence for which relief is sought should be an essential of the jurisdiction. I am considering the extent of the old ecclesiastical jurisdiction, which this court has inherited, and which it administers to-day in such suits as this with only certain statutory modifications, immaterial upon the question of jurisdiction. That jurisdiction was circumscribed by the Statute of Citations, which confined it to those inhabiting and dwelling in the diocese of the court issuing the citation. There is no hint that any conjoint dwelling, still less any conjoint "home," was required. All that was required was such physical presence of the respondent as should amount to inhabiting or dwelling.

It is true that in *Niboyet* v. *Niboyet* (1) JAMES, L.J., said, at p. 6:

> If I were asked to define, and it were necessary to define, what in the particular case of matrimonial infidelity constituted a matter matrimonial in England at the time when the Act was passed, I should define it to be a case of infidelity where the matrimonial home was in England—the matrimonial home in which the offended husband ought to be no longer bound to entertain the unchaste wife, or in which the chaste and offended wife ought to be no longer bound to share the bed and board of the polluted husband—the matrimonial home, the purity of which was under the watch and ward of the church there.

That passage no doubt seems to contemplate a common dwelling as a test of the jurisdiction, but it must be read in its context. JAMES, L.J., was really attributing the jurisdiction in favour of which he was arguing to the residence of the wrongdoer, as appears by the passage immediately preceding the one which I have quoted, and reference to the report of the case in the court below makes it clear that the parties had never lived together in England.

Again, in *Armytage* v. *Armytage* (2), GORELL BARNES, J., said, at p. 194:

> In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an Ecclesiastical Court, that Court would have interfered, if the parties were within the jurisdiction at the commencement of the suit, to protect the injured party against the other party in respect of the adultery or cruelty of the latter . . .

There was no matrimonial home in the physical sense in England in that case, and the decision rested upon the fact that both parties were residing in England at the commencement of the suit. Therefore, it throws no light upon what is meant by "matrimonial home." One meets the phrase again in relation to service of process out of the jurisdiction in *Perrin* v. *Perrin* (3). Doubts still prevailed as to what facts were essential for such service in suits for restitution of conjugal rights, and to solve them, the judge propounded certain rules. Those rules have ceased to have effect as such, but I suspect that they have given to this issue the form it takes, as they seem to have been taken as defining the jurisdiction, and not merely the essentials for service out of the jurisdiction. That case, however, does not define the term "matrimonial home." Nor did the judge purport to expand or contract the jurisdiction of this court by rules of procedure. The jurisdiction must not be measured by the wording of those rules, nor by the phrase "matrimonial home," except in so far as they are found to express succinctly the jurisdiction of the ecclesiastical courts.

I do not think that there is a better exposition in short compass of that jurisdiction than that given by James, L.J., in *Niboyet* v. *Niboyet* (1) at p. 4:

> Can there be any doubt that before the English Act of Parliament transferring the jurisdiction in matrimonial causes, from the church and her courts to the sovereign and her court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a divorce *a mensa et thoro*, and in either case for proper alimony ? The jurisdiction of the court Christian was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic church. The church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word domicil in the sense of the secular domicil, viz., the domicil affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or *in itinere*, no doubt was an important element ; but that residence had no connection with, and little analogy to, that which we now understand when we endeavour to solve, what has been found so often very difficult of solution, the question of a person's domicil.

Except as regards divorce, that passage has been accepted and acted upon as good law. Its emphasis is upon residence within the jurisdiction, and not upon any physical home.

No doubt a joint dwelling-place is the usual concomitant of a state of cohabitation, but it is not an essential. Cohabitation can exist long after—and, indeed, independently of—any joint home, and desertion can be established without reference to it. For the purposes of desertion, the matrimonial home is, *prima facie*, where the husband resides. There may, of course, be a number of good reasons why a joint home is not set up there, but, if there are no such reasons, and if the husband fails to set one up, the inference is that he has ceased cohabitation. If I am asked where he has done so, my answer is that he has done so where he ought to have set up the joint home.

Having regard to the principles upon which the ecclesiastical courts acted, would they have refused jurisdiction merely because the wrong-doing husband, having for some good reason left a joint home within the jurisdiction, had elected to live alone elsewhere within the jurisdiction, and had failed there to provide a home for his wife ? Let me take an extreme case. Suppose a married couple, of foreign domicil but living in England, left their home in one town to go to a new one a few miles away, and that, on the way, the husband deserted his wife. Has she no remedy in England ? Is she relegated to the tribunals of her husband's domicil ? I answer that she is not, if only for the reason that the husband cannot be allowed to take advantage of his own wrong. In truth, however, there would be a matrimonial home, in such circumstances, for, in a sense, the husband carries the matrimonial home upon his back. It is where he is, unless there are good reasons why it should not be—as, for instance, that he is a mere sojourner. In my judgment, therefore, the phrase " matrimonial home " extends, in relation to jurisdiction, to the husband's residence in England in such circumstances that any husband similarly circumstanced and not estranged from his wife would set up his home in England. Judged by that rule, the parties had a matrimonial home in or convenient to Blackdown when cohabitation ceased, and I answer the question propounded accordingly.

Protest struck out and a general appearance entered.

Solicitors: *Turner & Evans* (for the petitioner); *Bertram Sturt* (for the respondent).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

Re KAY AND LOVELL, TRUSTEE *v.* MOORE AND QUAIFE.

[CHANCERY DIVISION (Morton, J.), **April 7, 1941.**]

Bankruptcy—Re-opening transactions—Receiver's remuneration—Certificate of master obtained—Jurisdiction of court.

In the course of a partnership action, both partners became bankrupt, and the trustee in bankruptcy made an application for an order that the action be transferred from the Chancery Division to the Bankruptcy Division, that the receivers give up possession of the property of the bankrupts and that they bring in their accounts, and that the accounts be taken and passed and their remuneration assessed by one of the registrars of the court:—

HELD: such an order would not include accounts in respect of the receivers' remuneration which had already been passed by the master and certified. The court had no jurisdiction to make an order which would, in effect, re-open accounts already dealt with in the master's certificates.

[**EDITORIAL NOTE.** There is, of course, jurisdiction in bankruptcy to re-open transactions and the trustee is entitled to inquire into the genuineness of a debt for which judgment has been obtained. This jurisdiction, however, does not extend to reconsidering receiver's accounts which have been duly brought into chambers and have been certified as proper accounts by the master.

AS TO RE-OPENING TRANSACTIONS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 311, 312, para. 415; and FOR CASES, see DIGEST, Vol. 4, pp. 328-335, Nos. 3074-3144.]

Cases referred to:

(1) *Re Parker & Parker, Ex p. Official Receiver* (1884), 1 Morr. 39; 36 Digest 489, *1536*.

(2) *Re Van Laun, Ex p. Chatterton,* [1907] 2 K.B. 23; 4 Digest 326, *3058*; 76 L.J.K.B. 644; 97 L.T. 69; *affg.* S.C. *sub. nom. Re Van Laun, Ex p. Pattullo,* [1907] 1 K.B. 155.

(3) *Re Home and Colonial Insurance Co., Ltd.,* [1930] 1 Ch. 102; Digest Supp.; *sub nom. Re Home & Colonial Insurance Co., May* v. *Barham,* 99 L.J.Ch. 113; 142 L.T. 207.

MOTION by the trustees in bankruptcy for an order that the registrar should take and receive accounts and assess the remuneration directed to be taken and assessed by an order of the court, dated July 31, 1940. The facts are fully set out in the judgment.

G. F. Kingham for the applicant, the trustee.

W. A. L. Raeburn for the respondents, the receivers.

MORTON, J.: This is a motion by the trustee in bankruptcy of Henry James Kay and Clifford Percy Lovell for an order that Mr. Registrar KEAN should take and receive accounts and assess the remuneration directed to be taken and assessed by an order of this court dated July 31, 1940, in respect of the period during which such accounts have been taken and passed and the receivers' remuneration assessed by Master WILLMOTT in the partnership action referred to in the order of July 31, 1940. The respondents to the summons are Sir Harold Moore and Albert Edward Quaife, the receivers in question. The applicant on this motion was appointed to be trustee in bankruptcy of both of the bankrupts on July 3, 1940.

The earlier history of the matter is as follows. In Oct., 1938, Kay had taken a partnership action against Lovell, seeking a dissolution of the partnership and certain other relief. On Oct. 18, 1938, Sir Harold Moore was appointed receiver and manager of that partnership business. On Apr. 18, 1939, Quaife was appointed jointly with Sir Harold Moore as receiver and manager, and on Apr. 8, 1940, an order was made by consent that the partnership should be treated as dissolved as from the date of the issue of the writ, and the usual accounts and inquiries were directed. On Apr. 30, 1940, a receiving order was made against Lovell in respect of an act of bankruptcy committed on Mar. 6, 1940, and on May 4 a receiving order was made against Kay in respect of an act of bankruptcy committed some weeks before that date.

On July 31, 1940, I made an order on an application by motion on behalf of the trustee. The parties before me were the applicant, the trustee in bankruptcy, and the respondents, the two receivers whom I have named, and the order was as follows:

> It is ordered that the action *Kay* v. *Lovell* 1938 K. No. 828 in the Chancery Division be transferred to the judge sitting in Bankruptcy. That the receivers give up possession of the property of the bankrupts to the trustee and that they assign to the trustee all rights, property and choses in action belonging to the bankrupts and vested in them as such receivers without prejudice to the receivers' right to indemnity. That the receivers bring in their accounts and that the same be taken and passed and the receivers' remuneration assessed by Mr. Registrar KEAN one of the registrars of this court and thereupon the receivers be discharged.

It is upon the statements which I have just read in that order that the matters to be decided in the present actions arise. The order continued as follows:

> That the receivers' costs of this motion be taxed as between party and party and paid out of the estate. That the trustee's costs of this motion be taxed as between solicitor and client and paid out of the estate. Liberty to apply.

I am told that in Oct., 1940, an order was made to transfer the residue of the fund which had been dealt with in the Chancery action to the bankruptcy estate account.

By an application on Feb. 11, 1941, Mr. Registrar KEAN was asked to take and pass the receivers' accounts and to assess their remuneration directed to be taken, passed and assessed by the order of July 31, 1940. Prior to that date, in purported compliance with the order of July 31, 1840, the receivers had brought in three accounts which related to the period from Apr. 18, 1940, onwards. The receivers had previously rendered the following accounts. The first account of Sir Harold Moore, as sole receiver, covered the period from Oct. 18, 1938, the date of his appointment, to Jan. 1, 1939, and was taken by Master WILLMOTT in the partnership action, and the remuneration allowed to Sir Harold Moore for the period covered by the account (some 11 weeks) was 4,500 guineas. The second account of Sir Harold Moore as such receiver covered the period from Jan. 2, 1939, to Apr. 17, 1939, and was taken by Master WILLMOTT in the partnership action aforesaid, and the remuneration allowed for the period covered by that account (some 15 weeks) was 3,000 guineas. It appears that the remuneration in respect of the first account was fixed by the master on July 6, 1939. That appears from the affidavit of the trustee in bankruptcy filed in support of this application. The master made his certificate on July 28, 1939, which certificate was filed on July 29, 1939. By that certificate, he certified there was then due from Sir Harold Moore as receiver and manager as the balance of his account a sum of over £10,000, and in the course of the certificate these words appear :

> . . . in addition to the items of payment appearing in the said account I have allowed the sum of £4,725 for the remuneration of the said receiver and manager for the period covered by the said account.

As regards the second account and the remuneration of 3,000 guineas, that is mentioned in the master's certificate, dated June 27, 1940, and filed on June 28, 1940, when the master found the sum due from the receiver and manager and stated that he had allowed the sum of £3,150 for the remuneration of the receiver and manager for the period covered by the account. There are certain other accounts covering the period from Apr. 18, 1939, to Apr. 17, 1940, which, at the date of my order of July 31, 1940, had been brought into chambers in the partnership action, but such accounts had not been certified.

There is no dispute at all, as I understand the matter, that Mr. Registrar KEAN, pursuant to the order of July 31, 1940, should take the accounts which had been brought in covering the period from Apr. 18, 1939, onwards and should fix the remuneration of the receivers in respect of that period, but the dispute on this motion turns upon the first two accounts. It is said by counsel for the applicant that, notwithstanding that the master has made his certificate after the filing of these two accounts, and has allowed the remuneration of Sir Harold Moore for the period from Oct. 18, 1938, to Jan. 1, 1939, and from Jan. 2, 1939, to Apr. 17, 1939, Mr. Registrar KEAN ought, under the terms of my order, to go into these accounts again and reconsider the remuneration which was fixed by Master WILLMOTT, and, I suppose, alter it to such figure as he may think fit.

It appears also from the affidavit of the applicant that, when the matter came before Mr. Registrar KEAN, the registrar was of the opinion that the order of July 31, 1940, did not direct him to re-open the accounts already certified in the partnership action, but he said that, if the applicant, as trustee of the property of the bankrupts, desired the registrar to do so, he must apply to myself, and directed him so to do, and arrangements were made at the hearing before the registrar that the trustee should be at liberty to inspect the receivers' accounts and the relevant documents in the custody of the Bankruptcy Court.

In answer to this application, counsel for the respondent receivers takes three points. First of all, he submits that this motion proceeds on the wrong interpretation of my order of July 31, 1940. As regards the wording of that order, counsel for the applicant tells me—and, of course, I accept it—that, at the hearing on July 31, 1940, he referred me to *Re Parker & Parker, Ex p. Official Receiver* (1), and that the wording of the order followed the wording of the order in that case. I do not doubt that that is so, but counsel for the respondents draws attention to the fact that my order is to the effect that the receivers should bring in their accounts, and orders that the same be taken and passed and the receivers' remuneration assessed by Mr. Registrar KEAN. He says that that was in appropriate to the case of accounts brought in by one receiver—namely, Sir Harold Moore—in respect of the period when he was sole receiver, and, secondly, he says that the words are inappropriate, as referring to accounts already brought in and certified by the master. In my view, when I made that order, although I cannot charge my recollection as to what was in my mind when I did so, I cannot have intended to include in the scope of the order accounts which had been lodged by Sir Harold Moore, which had been vouched before the master, and which had in fact received his certificate. Apart from the question of the use of the plural in that order, to which I do not, in the circumstances, attach very much importance, I do not think that the wording I have read would have been employed if it had been intended that Mr. Registrar KEAN should re-open accounts which had already been dealt with by Master WILLMOTT, and which formed the subject of two certificates by Master WILLMOTT.

The result is that, as far as my order of July 31, 1940, is concerned, in my judgment it does not direct Mr. Registrar KEAN to take the account which was delivered by Sir Harold Moore in respect of the period from Oct. 18, 1938, to Jan. 1, 1939, or the period from Jan. 2, 1939, to Apr. 17, 1939.

Counsel for the respondents took as a second point that the court on the present application has no jurisdiction to re-open accounts already certified in the partnership action by two certificates which had become binding. He referred me to the terms of R.S.C., Ord. 55, rr. 70, 71. Rule 70 provides as follows :

> Every certificate, with the accounts (if any) to be filed therewith, shall be transmitted by the master to the central office to be there filed, and shall thenceforth be binding on all the parties to the proceedings unless discharged or varied upon application by summons to be made before the expiration of 8 clear days after the filing of the certificate ; provided that the time for applying to discharge or vary certificates, to be acted upon by the accountant-general without further order, or certificates on passing receivers' accounts, shall be two clear days after the filing thereof.

It is manifest, therefore, as far as r. 70 is concerned, that the certificates in question became binding upon all parties at the expiration of the period stated. Rule 71 provides as follows:

> The judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties.

For the purposes of this part of my judgment, I shall assume, without deciding the matter, that it was open to the trustee in bankruptcy to apply to this court for an order discharging or varying either or both of the certificates to which I have referred. Even assuming that there is before me a motion or summons to discharge or vary the certificates, I think that counsel for the respondents is right in saying that I have no jurisdiction to make any order which would in effect be an order re-opening the accounts which were already dealt with in the master's certificates and re-opening the question of remuneration which the master allowed to Sir Harold Moore in respect of the two periods which I have mentioned.

Counsel for the applicant referred me to *Re Van Laun, Ex p. Chatterton* (2), which was decided by BIGHAM, J. In that case, BIGHAM, J., said, at pp. 162, 163:

> The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him.

The decision in that case was confirmed by the Court of Appeal.

Counsel for the applicant also referred me to the judgment of MAUGHAM, J., in *Re Home & Colonial Insurance Co., Ltd* (3). I accept, of course, the principle laid down in the cases referred to, but, in my view, they have no application to the point I have to decide. The point I have to decide under this head of the argument of counsel for the respondents is whether on this application I can give the direction asked for by the applicant, and, in my view, I cannot do so. I have carefully refrained from expressing any view whatever as to the merits of the case, and as to whether or not the master allowed a satisfactory remuneration, as is suggested by counsel for the applicant. I do not think that it would be right for me to say anything on that matter at all on the present application.

The third argument of counsel for the respondents was that, at any rate, as to the first account delivered by Sir Harold Moore, which was dealt with by the certificate filed on July 29, 1939, no application to discharge or vary that certificate could possibly be received, because the certificate was made and filed and became binding some considerable time before the date to which the trustee in bankruptcy is entitled to relate back. Thus, he says, the receiver's remuneration has been claimed and allowed out of a fund in which the trustee in bankruptcy has, and had, no interest. As to the second account, dealt with by the second certificate, counsel for the respondents also submits that no application to discharge or vary that certificate could possibly succeed. He said that the receiver had a right to some remuneration, and that the amount was determined by the master, who fixed the remuneration on Dec. 14, 1939, and the receiver was entitled thereafter to retain the allowed remuneration fixed by the master. The certificate, he says, is a bar to any proceedings in regard to the remuneration which the master fixed. Alternatively, he contends that the receiver has a first charge in respect of the remuneration, and that the trustee must take his property subject to that charge.

As there is no motion to discharge or vary the certificate before me, I shall say no more than that I find it very difficult at the moment to see any answer to the argument of counsel for the respondents in regard to the first account and the first of the two certificates. As to his argument in regard to the second account and the second certificate, I do not propose to make any comments at all one way or the other, because I think that it would not be right to do so, in the circumstances of the case. That is an argument which would be strenuously contested by counsel for the applicant, and an argument, of course, which may have to be considered hereafter. The result is that this motion fails, and must be dismissed.

Motion dismissed with costs.

Solicitors: *C. R. Enever & Co.* (for the applicant); *Constant & Constant* (for the respondents).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

BOWMAKER, LTD. *v.* TABOR.

[Court of Appeal (Scott, MacKinnon and Goddard, L.JJ.), **March 28, April 8, 1941**].

Emergency Legislation—Contracting out of statutory provisions—Validity.

Emergency Legislation—Hire purchase—Hirer in arrear with instalments—Agreement to surrender car—Whether leave of court required—Claim for damages by hirer—Defence of volenti non fit injuria—Courts (Emergency Powers) Act, 1939 (c. 67), *s.* 1 (2).

The hirer of a motor car under a hire-purchase agreement after paying instalments amounting to more than half the purchase price agreed, on being pressed for arrears of the instalments, to surrender the car. He signed a document to the effect that he wished voluntarily to determine the hire-purchase agreement. The plaintiffs thereupon took possession of the car, which they later resold. The instalments owing at that time amounted to £68 0*s.* 4*d.* and the plaintiffs subsequently sued the hirer for that amount. It was contended that the taking possession of the car by the plaintiffs under the agreement to surrender was a void transaction under the provisions of the Courts (Emergency Powers) Act, 1939:—

Held: (i) it was not competent for the parties to agree that the plaintiffs should retake possession of the car without the leave of the court being obtained under the Courts (Emergency Powers) Act, 1939, s. 1 (2).

(ii) the hirer's consent to the retaking possession of the car was not a bar to his recovering damages for such retaking, since the maxim *volenti non fit injuria* does not apply where there has been a disregard of an obligation imposed by statute. The hirer was, therefore, entitled to damages for wrongful seizure.

[**EDITORIAL NOTE.** This decision, in effect, affirms the decision of FARWELL, J., in *Soho Square Syndicate, Ltd.* v. *Pollard* (*E.*) *& Co., Ltd.* (1), which is usually stated as deciding that parties cannot contract out of the Courts (Emergency Powers) Act, 1939. As is pointed out herein, in most cases there is really no question of contracting out and the better description of the transaction is a waiver of rights under the Act, but the judgment herein in terms extends to a case where there is a contract that the provisions of the Act shall be disregarded.

AS TO THE COURTS (EMERGENCY POWERS) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946, and BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, p. 206.]

Cases referred to:

(1) *Soho Square Syndicate, Ltd.* v. *Pollard* (*E.*) *& Co., Ltd.*, [1940] Ch. 638; [1940] 2 All E.R. 601; Digest Supp.

(2) *Jones* v. *Randall* (1774), 1 Cowp. 37; 12 Digest 263, *2155*.

(3) *Martindale* v. *Falkner* (1846), 2 C.B. 706; 14 Digest 47, *154*; 15 L.J.C.P. 91; 6 L.T.O.S. 372.

(4) *R.* v. *Tewkesbury Corpn.* (1868), L.R. 3 Q.B. 629; 22 Digest 162, *1379*; 37 L.J.Q.B. 288; 18 L.T. 851.

(5) *MacAllister* v. *Rochester* (*Bp.*) (1880), 5 C.P.D. 194; 21 Digest 296, *1062*; 49 L.J.Q.B. 114; 42 L.T. 22.

(6) *East India Co.* v. *Oditchurn Paul* (1850), 7 Moo. P.C.C. 85; 32 Digest 328, *144*.

(7) *Re Sandow, Ltd., Skipwith* v. *Sandow, Ltd.*, [1916] W.N. 262; 39 Digest 22, *243*.

(8) *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685; 36 Digest 8, *10*; 56 L.J.Q.B. 340; 57 L.T. 537.

(9) *Baddeley* v. *Granville* (*Earl*) (1887), 19 Q.B.D. 423; 36 Digest 98, *652*; 56 L.J.Q.B. 501; 57 L.T. 268.

(10) *Salford Union* v. *Dewhurst*, [1926] A.C. 619; 37 Digest 215, *105*; 95 L.J.Ch. 457; 135 L.T. 514; *affg.*, [1925] Ch. 655.

APPEAL by the plaintiffs from an order of His Honour JUDGE JARDINE sitting at the Bow County Court, dated Feb. 12, 1941. The facts are fully set out in the judgment of GODDARD, L.J.

W. Harvey Moore for the appellants.

H. H. Harris for the respondent.

Harvey Moore: By cl. 3 (b) of the hire-purchase agreement, the hirer was expressly entitled to determine the agreement. If he exercised this right, the Courts (Emergency Powers) Act, 1939, did not come into the question. The decision of FARWELL, J., in *Soho Square Syndicate, Ltd.* v. *Pollard* (*E.*) *& Co., Ltd.* (1) was wrong. [Counsel referred to *Re Sandow, Ltd., Skipwith* v. *Sandow, Ltd.* (7) and *Salford Union* v. *Dewhurst* (10).]

Counsel for the respondent was not called upon by the court.

GODDARD, L.J.: In this case, which raises a question of some interest at the present time, the plaintiffs let to the defendant on hire-purchase terms a motor car, the price of which was £443 11*s.*, payable by a first instalment of £88 2*s.* 6*d.* and the balance by 24 monthly instalments of

£14 16*s*. 2*d*. In Mar., 1940, the defendant was in arrears to the amount of £64 0*s*. 4*d*., though he had paid altogether £268 0*s*. 10*d*. Nye, the plaintiffs' representative, called on him, and, according to the evidence, which the county court judge accepted, Nye asked him if he could make any suggestion about payment. Apparently he could not, so Nye said that he had better return the car. The defendant then said that, if the company wanted the car, they had better have it. Nye had with him a supply of typewritten forms, apparently drafted and designed for such an occasion, and the defendant signed one of them, which bore the number of the hire-purchase agreement, and which read as follows:

> I hereby declare that it is my desire voluntarily to terminate the hiring under the above hire-purchase agreement and to surrender the vehicle concerned . . .

The plaintiffs thereupon appear to have retaken possession of the vehicle and then sued the defendant for the arrears, £64 0*s*. 4*d*. The defendant set up a defence that he was promised that, if he signed the agreement, the arrears would be forgiven, but this defence failed. However, he counterclaimed successfully for damages, on the ground that the plaintiffs retook the vehicle without obtaining the leave of the court under the Courts (Emergency Powers) Act, 1939, s. 1 (2). The county court judge held that the defendant signed this document because he felt that he could not keep up the instalments and knew what bargain he wanted and got it, but he decided in favour of the counterclaim, following the decision of FARWELL, J., in *Soho Square Syndicate, Ltd.* v. *Pollard (E.) & Co., Ltd.* (1). That is the extent of his note, but what it involves will appear later.

The agreement provided by cl. 3 (*b*) that, subject to cl. 5, the hirer might at any time determine the hiring by returning the vehicle at his own risk and cost to the owners at such address as the owners might appoint in good condition and repair, together with the registration book and licence and insurance certificate, such voluntary termination not to be complete until such documents had been delivered up to the owners. Clause 4 contained the usual clause empowering the plaintiffs to seize if the hirer should be in arrear with his payments, and by cl. 5 it was provided that, whether the car was returned by the hirer under cl. 3 or was retaken by the owners under cl. 4, the hirer remained liable for arrears of rent. There was a further provision that in either case the hirer would have to pay an amount necessary to bring the payments up to one-half of the total rent as compensation for depreciation, but nothing arises under this provision, as the defendant had already paid more than one-half of the total before the car was retaken.

Before us, the first point taken for the plaintiffs was that, by signing the form referred to above, the defendant exercised his right under cl. 3 (*b*), and that, therefore, the Courts (Emergency Powers) Act, 1939, had no application to the case. If that were the case, this contention would no doubt be sound. There is nothing in the Act to prevent a hirer from returning goods he has hired without the leave of the court. Sect. 1 (2) is designed to prevent the owner from exercising any remedy he may have by way of taking possession of property without the leave of the court. The county court judge could not have held that the defendant exercised his option and returned the car under cl. 3, because, if he had, there would have been no point in his reference to the decision of FARWELL, J., in *Soho Square Syndicate, Ltd.* v. *Pollard (E.) & Co., Ltd.* (1), and it is abundantly clear that there was no evidence on which he could so have found. For cl. 3 to operate, the hirer must return the car at his own risk and cost to such address as the owner may appoint, with the relevant documents, and the clause obviously contemplates a state of things wholly different from that which existed here. That clause neither contemplates, nor is applicable to, giving up the car under the terms of the document which the defendant signed. It may be true that in one sense the car was given up voluntarily, but what it really amounts to is that the defendant assented to the owners exercising their right to retake it, and that is entirely consistent with Nye's evidence.

The question then arises whether, if the parties so agree, they can dispense with the necessity of the owners obtaining the leave of the court to the retaking of the property in question. In other words, can the parties contract out of the provisions of the Courts (Emergency Powers) Act, 1939, or can the defendant effectively waive his right to object that the property has been taken without the leave of the court ? We have very little doubt that the document which the defendant was given to sign, and which he did sign, was drafted for the express purpose of endeavouring to avoid the necessity of applying to the court, and, if it does achieve that object, it is obvious that there is a loophole in the Act of which not only hire-purchase dealers, but also others to whom the various remedies of self-help dealt with in sect. 1 (2) are available, will not be slow to take advantage. Tenants who are behind with their rent, borrowers, and purchasers on hire-purchase terms who cannot keep up their instalments are in no position to bargain with their landlords and creditors, and, for each one who knows of the Courts (Emergency Powers) Act, 1939, there are probably scores who have never heard of it. It is entirely fallacious to say that everyone is presumed to know the law. That fallacy was exposed once and for all by LORD MANSFIELD, C.J., in *Jones* v. *Randall* (2), at p. 40 :

> . . . it would be very hard upon the profession if the law was so certain that everybody knew it : the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort.

Then, in *Martindale* v. *Falkner* (3), MAULE, J., said, at p. 719 :

> There is no presumption in this country that every person knows the law : it would be contrary to common sense and reason if it were so.

After citing *Jones* v. *Randall* (2), MAULE, J., went on to say, at p. 720 :

> The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract.

This judgment was cited with approval by BLACKBURN, J., in *R.* v. *Tewkesbury Corpn.* (4), at p. 635.

The present case appears to us not to be, one of an attempt to contract out of the Act, but one where it was sought to waive its provisions. The document signed by the defendant is not, in our opinion, contractual. That is to say, it does not appear that the parties meant to make a contract that the Act should not apply to the existing agreement of hire-purchase. It is no more than a consent by the defendant to the exercise by the plaintiffs of a right of seizure which the hire-purchase agreement already gave them. However, we do not think that anything turns on this, as, whether it be a case of contracting out or one of waiver, the same principles apply. The maxim which sanctions the non-observance of a statutory provision is *cuilibet licet renuntiare juri pro se introducto.* Everyone may waive the advantage of a law made solely for the benefit or protection of an individual in his private capacity, but this cannot be done if the waiver would infringe a public right or public policy: *MacAllister* v. *Rochester* (*Bp.*) (5). A good illustration of a protection which can be waived is afforded by the Statute of Limitations, which a debtor can waive if he chooses: *East India Co.* v. *Oditchurn Paul* (6). Thus, it is necessary to consider, in the first place, exactly what the operation of the statute in question is. It does not in terms confer a benefit or protection on the debtor. What it does is to restrain a creditor under a pre-war contract from enforcing his remedies, whether under a judgment or under an agreement, or, in the case of a distress, under the common law, without the leave of the court. The result may be—and perhaps, in the majority of cases, is—to confer a measure of protection on the debtor, but this by no means follows, as the court may, and often does, give the creditor leave to proceed unconditionally. The terms of the Act are peremptory, and there is certainly nothing in it to suggest that the legislature contemplated that an application to the court might be dispensed with in any circumstances. Even if the debtor does not appear on the hearing of the application in order to show that his inability to pay arose out of circumstances due to the war, it might well be that the court could see that there were such circumstances—for instance, if, in the case of the hire purchase of furniture, the debtor were a private soldier on active service. Suppose it appeared that he had paid all but the last two instalments and had then been called up for service, the court would, we think, be bound to refuse leave to seize until it could be satisfied that it was proper to permit it, and then might give leave to seize only a portion of the goods. At any rate, by making it obligatory on the creditor to apply to the court, the Act at least gives the latter the power to protect the debtor against himself. We realise the difficulty felt by Farwell, J., in *Soho Square Syndicate, Ltd.* v. *Pollard* (*E.*) *& Co., Ltd.* (1), and perhaps in a greater degree than he did, in seeing how, when a statute takes away from a person a power or a right, it can be revested in him by the consent of the other party. If the Act had placed the onus on the debtor of applying for relief, it might very well be that different considerations would obtain, but Parliament has deliberately restrained the creditor from proceeding until the leave of the court has been obtained by him, and we see no warrant for holding that the consent of the debtor can relieve him of that obligation. It seems to us that it is just because debtors may be ignorant of the provisions of the Act that the legislature has enacted that the creditor must get leave to proceed, and has not put on the debtor the burden of seeking to restrain him. If one class of creditor can, by obtaining the consent of his debtor, avoid the necessity of applying to the court, so can all classes, and we entirely agree with FARWELL, J., in thinking that this would conflict with the obvious policy which Parliament had in mind, and need not repeat the weighty reasons which he gave for so deciding.

However, there is one other matter which is worth consideration. If contracting out or waiver is permitted, it will be open to judgment creditors to proceed to execution if they can extract a consent from the debtor. This court has held, and the amending Act of 1940 has expressly recognised, that, in considering whether leave should be given, regard must be had to all the liabilities of the debtor. The court must not, by giving leave to proceed in full to the creditor who has got in first, put it out of the debtor's power to pay something to other creditors. To use the words of SCOTT, L.J., it must endeavour to do a measure of distributive justice. This might well become impossible if a creditor in a position to exercise pressure could induce the debtor to agree that the Act should not apply in the case of his debt. This seems to us to be another good reason for holding that consent cannot dispense with the necessity of an application to the court. Our attention was called to two cases decided under the Act of 1914. In the first case, *Re Sandow, Ltd., Skipwith* v. *Sandow, Ltd.* (7), SARGANT, J., expressed the opinion that the necessity of obtaining the leave of the court could be dispensed with by consent, but the point was not argued, as the application was *ex parte,* and it is said that in another case ATKIN, J., held that the necessity for getting leave to distrain could be avoided by consent of the tenant. These cases are not binding on this court, and there is no authority binding us on the subject. In our opinion, neither contract nor waiver will excuse a creditor from observing the provisions of the Act.

There is one matter which we think should be noticed, though it was not directly raised in argument. Can it be said that, although performance of the obligation cast upon the owners by the statute cannot be waived, yet, as the hirer must here, on the findings of the county court judge, be regarded as having consented to the seizure, he cannot be entitled to damages ? In other words, does the doctrine of *volenti non fit injuria* apply ? We think that this is answered by the decision of this court in *Thomas* v. *Quartermaine* (8), where it was held that this maxim does not apply where there has been a disregard of an obligation imposed by statute. That case was considered and followed by the Divisional Court in *Baddeley* v. *Granville* (*Earl*) (9), where WILLS, J., said, at pp. 426, 427:

> As to the result of past breaches of the obligation [imposed by statute], people may come to what agreements they like ; but as to future breaches of it, there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal, though I do not hold as a matter of law that it would be so. But it seems to me that if the supposed agreement . . . in consequence of which the principle of *volenti non fit injuria* is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others, as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to.

While that case arose under the Employers' Liability Act, 1880, and the facts were, of course, very different from those in the present case, the principle laid down is clear, and can well be applied here. If the person whose goods are seized has not the right to sue for damages, it follows that the only sanction applicable to the person who disregards the provisions of the Act will be an indictment for the common law misdemeanour of disobeying a statute, which is a very unsatisfactory state of affairs. No argument was addressed to us that, if the defendant was entitled to succeed on his counterclaim, the damages have been assessed on any wrong principle, and the result is that this appeal should be dismissed.

We want to add one further word. We do not desire that it should be thought that, in cases where a hire-purchase agreement contains a clause such as cl. 3 (*b*) in the present case, the owners can avoid the necessity of going to the court by putting pressure on the hirer to act ostensibly under that clause, when in fact all that they are doing is getting a consent to seize. Where a hirer has paid a substantial sum by way of instalments, the number of cases in which, owing to temporary embarrassment caused by war conditions, he will really be willing to forgo the benefit of all that he has paid must, we think, be very small. If such a case came before a court, we think that it would be the duty of the court to ascertain whether the return of the chattel was really and truly the *bona fide* exercise of the option given by the clause or whether in truth it was no more than a submission by the hirer to the owner exercising his right to seize.

Scott, L.J. : That is the judgment of Goddard, L.J., and myself.

MacKinnon, L.J. : I have had the advantage of reading the judgment prepared by Goddard, L.J. I entirely agree with it, and I desire to say only a few words in addition.

The appellants argue that they committed no breach of the Act which prohibited their taking possession of the car without the leave of the court, for they say that the respondent consented to what they did by signing the document produced to him by Nye. Manifestly, the object of the Act is to protect those in the position of debtors from the exercise against them of the rights of their creditors. If the argument of the appellants is correct, that protection ceases for a humble and submissive debtor, and avails only one who is astute and assertive of the benefit given him by this Act. The protection given by the Act against coercion will disappear in every case in which coercion is applied with sufficient vigour to make the man intended to be protected admit that he is not.

Prima facie, the appellants took possession without getting the leave of the court. That is contrary to the terms of the Act. I think that it is no answer for them to say : " We did so, however, with the consent of the respondent." That is what the county court judge held, and I think that he was right. He did so upon the authority of Farwell, J., in *Soho Square Syndicate, Ltd.* v. *Pollard (E.) & Co., Ltd.* (1). I express no doubt whatever as to the correctness of that decision, but the terms in which it was discussed were upon a question whether a person entitled to the benefit of the Act could by contract agree to forgo that benefit. I do not think that that question arises in this case. I see no evidence that the respondent ever made any contract with the appellants by which he agreed to forgo the benefit of the Act, nor can I see that there was any consideration for such a contract. All the respondent did was to sign a consent, and, following that, the appellants took possession of the car without any leave from the court. I think that it is no excuse for that breach of the prohibition of the Act for the appellants to say : " The respondent was so fainthearted or ignorant that he consented to our doing what we did." In the result, I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors : *Field, Roscoe & Co.*, agents for *W. Parkinson Curtis*, Bournemouth (for the appellants) ; *Stone & Stone* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

PROCTOR *v.* PEEBLES (PAPERMAKERS), LTD.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.JJ.), **March 14, 1941.**]

Practice—Medical report—Case tried upon agreed medical report—When order for case to be so tried is proper. A

Cases where the medical report is such that the court or cross-examining counsel may properly ask questions to disclose to the lay mind the full meaning and effect of such report should not be ordered to be tried upon an agreed medical report.

B

[**EDITORIAL NOTE.** This is merely a practice note. It is right that every proper course should be taken to curtail the expense of litigation, and one of the methods adopted for the saving of expense has been the adoption of an agreed medical report. There are, however, cases where it is necessary to have the medical practitioner called as a witness, so that he may explain the meaning of technical expressions and generally state their effect to the court. It is only in cases where there is no necessity for any questions of this nature to be put to the doctor that an order should be made for trial upon an agreed medical report. C

AS TO ORDERS ON SUMMONS FOR DIRECTIONS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 51, 52, para. 83; and FOR CASES, see DIGEST, Practice, Nos. 1800-1816.]

APPEAL by the plaintiff from a judgment of CROOM-JOHNSON, J., at Manchester Assizes, dated Dec. 3, 1940. The appeal is only reported to record certain observations of MACKINNON and DU PARCQ, L.JJ., upon agreed medical reports. This subject was not referred to in the judgment of GODDARD, L.J. D

Wilfrid Clothier, K.C., and *E. Rowson* for the appellant. E

Humfrey H. Edmunds for the respondents.

MACKINNON, L.J.: The judge seems to have mentioned with disapproval the fact that the plaintiff called the doctor as a witness at the trial. He visited that error of judgment, as he called it, with some penalty as to costs. In his view, the doctor should not have been called, and the medical report ought to have been agreed between the parties. I think that it is unfortunate that the judge, by a threat of that sort, should discourage people from calling doctors, and should cause them to substitute written reports. We have repeatedly had to consider cases which have been tried upon agreed medical reports. Very often, a doctor expresses himself in technical language, of which the meaning is not obvious to the layman. It is of the greatest possible advantage that the doctor should be called and should give his evidence subject to cross-examination, and as a qualification of what he has written. To discourage people from affording the court the value of that assistance is a most unfortunate result. F G H

DU PARCQ, L.J.: I agree, and I wish to add a few words on the topic referred to by MACKINNON, L.J. In this case, the usual order was made upon the summons for directions that " the medical report be agreed as between the parties, if possible, and failing agreement evidence to be limited to two witnesses on each side." I think that that was a form of order which was first made under the new procedure. I sat for some time to deal with cases under the new procedure, and I have no doubt that it is a useful part of the order for directions. As with all orders which may be useful, it is a mistake to think that it is always useful, and that it ought to be included as a matter of course. I have had to complain sometimes that this part of the order has been ignored. If it is right that the order should be made, it is wrong that it should be ignored. I doubt if the present case is one in which it was proper to make it. It was not proper to make it because we should have been at a disadvantage, as the judge would have been at a disadvantage, if no doctor had been in court. There are cases in which the order may be useful, as, for instance, where a man has broken his leg. The doctor is only required to say how long the man has suffered and that there is no permanent injury. There may be cases in which there is no permanent injury. One does not want a doctor to tell one that, if there is no disagreement about it. However, in a case where prognosis is an important matter, it is most desirable that a doctor, or doctors, should be present in court to answer any questions which the judge may wish to ask. I say this because we ought not to discourage the making of that order in proper cases, but the direction ought not to be included as a matter of course. The master or the registrar should consider whether the case is suitable for hearing with a report. If it is, the order ought to be made and the parties should observe it.

Solicitors: *Robinson & Bradley*, agents for *Oddie & Roebuck*, Blackburn (for the appellant); *L. Bingham & Co.*, agents for *James Chapman & Co.*, Manchester (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* GAUNT

[King's Bench Division (Lawrence, J.), **March 18, 19, April 8, 1941.**]

Income Tax—Disposition—Settlement—Power to declare new trusts—" Wife " not a widow—Ultimate trust in favour of settlor—Finance Act, 1938 (*c.* 46), *s.* 38 (2), (3), (4).

By a settlement dated Mar. 10, 1938, the respondent assigned £100 to trustees and directed them to purchase certain shares. By cl. 2 (*a*) of the settlement, the income therefrom was to be accumulated and invested during his lifetime, and, by cl. 2 (*b*), after his death the trustees were to hold the trust fund subject to such trusts as he might by will or codicil declare. Clause 3 declared that neither he nor any wife of his should benefit from the trust during his lifetime. Clause 7 provided that he might appoint new trusts subject to the consent of certain persons, but this power was not to be exercisable in his favour or in favour of any wife of his. The appellants contended that the amounts so apportioned, should be treated as the respondent's income for the purposes of sur-tax under the Finance Act, 1938, s. 38 (2), (3), (4), on the ground that, by cl. 2 (*b*) of the settlement, the respondent's wife might benefit after his death, and that, by cl. 7, the income might be applied for his benefit, although not paid directly to him. It was further contended that the provisions of cl. 2 might infringe the rule against perpetuities and create a resulting trust to the settlor's estate :—

Held : (i) by virtue of cl. 7, the settlor might appoint a new trust of a discretionary nature with himself as one of the *cestuis que trust,* and, as a result, he had power to secure a benefit for himself or his wife within the meaning of sect. 38 of the Act.

(ii) the word " wife " in sect. 38 does not include a widow, and, consequently, the fact that the settlor's widow might benefit after his death did not bring the case within the section.

(iii) even if the settlement infringed the rule against perpetuities, the resulting trust to the settlor's estate is not an interest of the settlor within the terms of sect. 38 (3), (4).

[**EDITORIAL NOTE.** The increase in the rate of income tax and sur-tax adds considerable importance to the construction of the clauses in settlements designed to avoid the incidence of sur-tax. Although the settlement in this case is held not to have achieved its purpose, the decision is of considerable assistance to those drafting such settlements. It is now clear that settlements which include an ultimate trust for the settlor and those which include provision for his widow are not within the section. In the present instance it appears that the object was defeated by reason of the fact that the clause negativing any benefit to the settlor or his wife did not extend to exclude a benefit under a discretionary trust.

As to Dispositions of Income Ineffective for purposes of Taxation, see HALSBURY, Hailsham Edn., Vol. 17, pp. 268-270, paras. 538, 539 ; and for Cases, see DIGEST Supp., Income Tax, Nos. 575a-576e.]

Case referred to :

(1) *Bristow* v. *Skirrow* (*No. 1*) (1859), 27 Beav. 585 ; 44 Digest 519, *3374* ; 1 L.T. 180.

Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts under the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice.

By a settlement made on Mar. 10, 1938, between the respondent and certain named trustees, the respondent assigned £100 to the trustees, who were directed to invest £98 thereof in purchasing 98 deferred shares of £1 each in the Bias Bay Investment Co., Ltd. Clause 2 (*a*) of the A settlement directed the trustees to accumulate and invest the income of the trust fund during the lifetime of the respondent. Under cl. 2 (*b*), the trustees were to hold the trust fund from and after the death of the respondent subject to such trusts, and with and subject to such powers and conditions, as he might by will or codicil declare. Clause 3 declared that B neither he nor any wife of his should benefit from the trust during his lifetime. Clause 7 declared that he might, with the consent of certain persons, declare new trusts, provided that this power should not be exercisable in his favour or in favour of any wife of his. A direction was made by the Commissioners under the Finance Act, 1922, s. 21, that the C company's actual income for 1937-1938 and 1938-1939 should be apportioned as to £13,473 17*s*. 9*d*. and £14,052 for those years of assessment respectively to the trustees of the settlement.

On behalf of the appellants, it was contended that the amounts apportioned to the trustees should be treated as the respondent's income for D the purposes of sur-tax by reason of the provisions of the Finance Act, 1938, s. 38 (2), or, alternatively, sect. 38 (3), (4), inasmuch as (i) under cl. 2 (*b*) the respondent's wife might benefit after his death, or (ii) a declaration of new trusts might be made under cl. 7 during the respondent's lifetime, under which the income might be applied for his benefit although E not paid directly to him. The Commissioners held that neither the respondent nor his wife could receive any benefit under the settlement, that the word " wife " did not include a widow, and that the settlement did not come within the provisions of the Finance Act, 1938, s. 38. In the result, they held that the respondent was not liable to assessment F on the sums apportioned as being his income for the purposes of sur-tax.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellants.

Frederick Grant for the respondent.

G LAWRENCE, J.: Three main questions arise in this case on the construction of a settlement made by the respondent on Mar. 10, 1938, and of the Finance Act, 1938, s. 38. First, does the power conferred upon the settlor by cl. 7 of the settlement bring the income of the trust fund within sect. 38 (3), (4), of the Act ? Secondly, does the power of H the settlor, either under cl. 2 or under cl. 7, by will to benefit his wife after his death, bring the income of the trust fund within sect. 38 ? Thirdly, do the provisions of cl. 2 offend against the rule against perpetuities, and thereby or otherwise create a resulting trust to the settlor ?

Upon the first question, it was contended on behalf of the Crown that cl. 7 of the settlement empowers the settlor to appoint new trusts which, though not drawn expressly in his favour or in his wife's favour, are intended solely to benefit him, and that such a power implies that the income of the trust fund may, in certain circumstances, become applicable for the benefit of the settlor or his wife within the meaning of sect. 38 (4). For the respondent, it was contended that cl. 7 does not empower the settlor to appoint a new trust which in any way benefits him or his wife, that the provision as to consent was introduced solely to satisfy the minds of the persons asked to consent, and that, if that provision conflicts with the previous provision against exercising the power in favour of the settlor, it must be disregarded.

Upon the second question, it was contended for the Crown that sect. 38 has regard to the person who is the settlor's wife at the time of the settlement, and that, if the settlement confers any benefit upon that person, whether she be wife or widow when the benefit is to be enjoyed, the settlement is within the section. For the respondent, it was contended that the word " wife " means " wife " and not " widow," and that, if the benefit of the settlement cannot be enjoyed until after she has ceased to be the settlor's wife, the settlement is not for that reason within the section.

Upon the third question, it was contended for the Crown that, since, by cl. 2 (*b*), the trustees were to hold the trust fund after the death of the settlor upon such trusts as the settlor might by will declare concerning his residuary estate, the settlement might offend against the rule against perpetuities, in which case there would be a resulting trust to the settlor, which would be an interest within the meaning of sect. 38 (4), and that, even apart from the rule against perpetuities, the settlor had an immediate interest in the trust fund from the date of the settlement by reason of his power to declare by will trusts which would enable his estate to enjoy the trust fund at his death. It was argued that cl. 2 (*b*) did not confer a general power of appointment upon the settlor, in which case the rule against perpetuities would begin to run from the exercise of the power, because he had no power thereunder to make the property his own, and could not alter the provisions of cl. 2 (*b*), and that, therefore, it was a referential trust under which the rule ran from the date of the settlement. For the respondent, it was contended that cl. 2 (*b*) did confer a general power of appointment, but that, even if it did not, the resulting trust, if any, could not be to the settlor in his lifetime, but must be to his estate after his death, and, therefore, did not bring the settlement within sect. 38. The respondent relied in this connection upon *Bristow* v. *Skirrow* (*No. 1*) (1).

Upon the first point, I am of opinion that the terms of cl. 7 do bring the present settlement within sect. 38. I think that, on the true construction of the words " in favour of the settlor," when contrasted with the words which follow, the settlor had power to secure for himself such a benefit as would bring the settlement within sect. 38 — for instance, if he appointed a new trust of a discretionary nature, with himself as one of the *cestuis que trust*. In my view, such a construction gives a meaning to all parts of the clause, and ought, therefore, to be adopted rather than that the last part of the clause should be rejected, nor am I able to give the restricted meaning to that part contended for by the respondent.

On the second point, I am of opinion that the object of the section is to
A prevent the settlor from getting the benefit of the trust fund during his
lifetime. It is not to prevent his wife from enjoying the trust fund after
his death, and I do not think that the word " wife " is apt to describe the
settlor's widow. The income must be capable of being paid to, or for the
benefit of, the wife, which, in my opinion, means while she is his wife.
B On the third point, I am of opinion that, even if the settlement does offend
against the rule against perpetuities, the resulting trust to the settlor's
estate is not an interest of the settlor within the meaning of section 38 (3),
(4). Under such a resulting trust, the income can in no circumstances
become payable to the settlor himself, nor has the settlor, in my opinion,
C such an immediate interest as falls within the section. Even if he can
sell the reversion to the trust fund, the proceeds of such sale are not, in
my opinion, " income arising under or property comprised in the settlement " within subsect. (4). The appeal will be allowed with costs.

D *Appeal allowed with costs.*

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Ashurst, Morris, Crisp & Co.* (for the respondents).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* F. A. CLARK & SON, LTD.

BRITISH AMERICAN TOBACCO CO., LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Lawrence, J.), **March 27, 28, April 8, 1941.**]

Revenue—National defence contribution—"Controlling interest" in company—Indirect control—Finance Act, 1937 (*c.* 54), *Sched. IV, paras.* 4, 7 (*b*), 11.

In the first case, F. C. B. C. and F. H. B. C. were the sole directors of, and held all the issued shares in, an investment company. By reason of its shareholding in the respondent company this company controlled the majority of the votes in the respondent company, in which F. C. B. C. and F. H. B. C. were also the only directors.

In the second case, the appellant company held shares in eleven companies operating outside the United Kingdom, which were, therefore, not liable to be assessed to the national defence contribution. In the case of 4 of these companies, the appellant company itself controlled more than 50 per cent. of the votes. In the case of the remaining 7 companies, more than 50 per cent. of the votes were controlled by the appellant company in conjunction with a company or companies in which the appellant company controlled more than 50 per cent. of the votes :—

Held : on the proper construction of the Finance Act, 1937, Sched. IV, paras. 4, 7 (*b*), 11, "controlling interest" in a company includes an indirect, as well as a direct, controlling interest, and the respondent company in the first case and the appellant company in the second case were subject to the national defence contribution.

[**EDITORIAL NOTE.** The problem as to what constitutes a "controlling interest" in a company within the meaning of the Finance Act, 1937, Sched. IV, paras. 4, 7 (*b*), 11, is one of considerable interest and importance to the business community. It was contended by the companies concerned that the term could not be held to include an indirect controlling interest in a company, on the principle *expressio unius est exclusio alterius*, and that, in certain other statutes where the question of control is dealt with, the words "direct or indirect," or "directly or indirectly," are used where the legislature intended that the terms "control" or "controlling interest" should have a more extended meaning. Apt illustrations are provided by the Finance Act, 1920, s. 53 (2) (*b*), (*c*), and also by the Finance Act, 1936, s. 19 (1) (*a*), amending the Finance Act, 1922, s. 21 (6). It is held, however, that the word "interest" must be interpreted liberally, and that, when it is used with the word "controlling," it covers an indirect, as well as a direct, controlling interest.

As to Control of Company, see HALSBURY, Hailsham Edn., Vol. 17, pp. 89-92, para. 187, p. 290, para. 576 ; and for Cases, see DIGEST, Vol. 28, pp. 25-30, Nos. 136-154.]

Cases referred to :

(1) *Macaura* v. *Northern Assurance Co.*, [1925] A.C. 619 ; Digest Supp. ; 94 L.J.P.C. 154 ; 133 L.T. 152.

(2) *Lapish* v. *Braithwaite*, [1926] A.C. 275 ; 33 Digest 67, *405* ; 95 L.J.K.B. 406 ; 134 L.T. 481.

(3) *Skinner* v. *A.-G.*, [1940] A.C. 350 ; [1939] 3 All E.R. 787 ; Digest Supp.

(4) *Mitchell* v. *Noble (B.W.), Ltd.*, [1927] 1 K.B. 719 ; Digest Supp. ; 96 L.J.K.B. 484 ; 137 L.T. 33 ; 11 Tax Cas. 372.

CASES STATED under the Finance Act, 1937, Sched. V, Part II, r. 4, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

In the first case, the respondent company was assessed to the national defence contribution under the Finance Act, 1937, Sched. IV, paras. 4, 11, for the period Apr. 1, 1937, to Dec. 31, 1937. At all material times, F. C. Brown Clark and F. H. Bessemer Clark were its only directors. The issued capital of the company consisted of £22,600, divided into 22,500 preference shares and 100 ordinary shares. All shares carried the right of one vote each. On Feb. 16, 1927, F. C. Brown Clark, under a deed of trust, transferred 15,000 preference shares in the respondent company to trustees, who undertook to vote as he should direct, on trust to pay the interest therefrom to the settlor for life, and after his death to transfer the shares to F. H. Bessemer Clark. Up to Dec. 23, 1937, 14,999 of these shares remained in the names of the trustees. On Dec. 2, 1936, F. C. B. C. (Phoenix) No. 1 Co. (hereinafter called the Phoenix company) was incorporated as an unlimited company. F. C. Brown Clark and F. H. Bessemer Clark were its sole directors, and held all its issued shares. By an agreement, dated Dec. 7, 1936, the Phoenix company purchased the 14,999 preference shares in the respondent company from the trustees, but the shares were not transferred to the Phoenix company until Dec. 10, 1937, the transfer being registered on Dec. 27, 1937. The question in issue was whether F. C. Brown Clark and F. H. Bessemer Clark, the two directors, had, in the material accounting period, a controlling interest in the respondent company within the meaning of the Finance Act, 1937, Sched. IV, paras. 4, 11. If they had such a controlling interest, then the deduction from the profits of the respondent company in respect of its liability to the national defence contribution of the excess of a proportion of their remuneration (£7,500 per annum) over a proportion of £1,500 and certain interest and annuities paid to them would fall to be disallowed.

On behalf of the respondent company, it was contended (i) that the Phoenix company, having been duly incorporated under the provisions of the Companies Act, 1929, was a legal entity separate and distinct from its shareholders, (ii) that, as from Dec. 7, 1936, the Phoenix company alone was beneficially entitled to the voting rights annexed to the 14,999 preference shares of the respondent company, and, accordingly, (iii) that the directors F. C. Brown Clark and F. H. Bessemer Clark did not at any material time have a controlling interest in the respondent company.

On behalf of the Revenue, it was contended that the two directors had a controlling interest in the respondent company throughout the accounting period, in that (i) up to Dec. 23, 1937, the trustees were the registered shareholders of the 14,999 preference shares, and were required by cl. 4 of the deed of trust to vote as F. C. Brown Clark should direct, or, alternatively, (ii) that, if, after Dec. 7, 1936, and up to Dec. 23, 1937, the trustees were required to vote in accordance with the directions of the Phoenix company, having regard to the fact that that company was controlled by the persons who were the directors of the respondent company, the trustees, in effect, were required to vote in accordance with the directions of the directors of the respondent company, and (iii) after Dec. 23, 1937, the directors of the respondent company, by reason of their control of the Phoenix company, and through that company's holding of shares in the respondent company, had a controlling interest in the respondent company.

The commissioners held, first, that the Phoenix company, a separate legal entity, as from Dec. 7, 1936, acquired the beneficial interest in the preference shares of the respondent company, and from that date cl. 4 of the deed of trust ceased to have any operative effect so far as those shares were concerned, and the registered holders of these shares became bare trustees for the Phoenix company. Until the transfer was registered on Dec. 23, 1937, the voting rights in the shares remained with the registered holders, but they had to be exercised under the direction of the Phoenix company. Consequently, from Dec. 7, 1936, to Dec. 23, 1937, the directors of the respondent company had no controlling interest therein. Secondly, the commissioners held that, after Dec. 23, 1937, the Phoenix company became the registered holder of the shares, and could attend general meetings of the respondent company by proxy and vote. The fact that F. C. Brown Clark and F. H. Bessemer Clark were the sole directors and holders of all the issued shares in the Phoenix company did not establish a controlling interest by them in the respondent company, of which they were also sole directors. The commissioners therefore discharged the assessment.

In the second case, the appellant company owned shares in companies carrying on business in various parts of the world, from which it received dividends from time to time. The case under consideration concerns dividends received by the appellant company from 11 of these companies, which, since they did not carry on business in the United Kingdom, were not themselves liable to the national defence contribution. The sole point in issue is whether the appellant company had a controlling interest in these 11 companies within the meaning of the Finance Act, 1937, Sched. IV, para. 7 (*b*), which provides as follows:

> . . . in the case of any other trade or business, being a trade or business carried on by a body corporate, the profits shall include all income received by way of dividend or distribution of profits from any other body corporate in which the first-mentioned body corporate has a controlling interest and which is not liable to be assessed to the national defence contribution . . .

In the case of 4 of these companies the appellant company itself owned more than 50 per cent. of the votes. In the other 7 cases, it did not in its own name own 50 per cent. of the votes, but more than 50 per cent. of the votes were owned by the appellant company and a company or companies in which the appellant company owned more than 50 per cent. of the votes and/or a company or companies in which more than 50 per cent. of the votes were owned by a company in which the appellant company owned more than 50 per cent. of the votes. In 4 of these 7 companies, 100 per cent. of the votes were so owned. "A" company, one of the 7 companies, provides a typical example of the organisation of the voting power. The appellant company owned 33⅓ per cent. of the votes therein. The Westminster Tobacco Co., Ltd., likewise owned 33⅓ per cent. of the votes, and the appellant company owned 100 per cent. of the votes in the Westminster Tobacco Co., Ltd. Tobacco Investments, Ltd., owned the remaining 33⅓ per cent. of the votes, but Tobacco Securities Trust, Co., Ltd., owned 100 per cent. of the votes in Tobacco Investments, Ltd., and the appellant company owned 59.17 per cent. of the votes in Tobacco Securities Trust Co., Ltd. An additional assessment to the national defence contribution in the sum of £354,864, in respect of the period Apr. 1, 1937, to Sept. 30, 1937, was made on the appellant company under the Finance Act, 1937, Sched. IV, para. 7 (*b*), on the ground that it had a controlling interest in the 11 companies.

On behalf of the appellant company, it was contended (i) that the words "controlling interest" implied a proprietary right, and that, before it could be successfully claimed that the appellant company had a controlling interest in any one of the 11 companies, it must be shown that the appellant company did, in fact, itself own beneficially a controlling number of shares or votes in the respective companies, (ii) that in no one of the 11 companies did the appellant company beneficially own such a preponderance of shares or votes as was necessary in order to give it control, and (iii) that the appellant company did not have a controlling interest in any of the 11 companies.

On behalf of the Revenue, it was contended that the appellant company had a controlling interest in each of the 11 companies within the meaning of the Finance Act, 1937, Sched. IV, para. 7 (*b*). The commissioners held that the appellant company had a controlling interest in each and all of the 11 companies, and that it was, therefore, properly assessed.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellants in the first appeal and for the respondents in the second appeal.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellants in the second appeal.

F. Heyworth Talbot for the respondents in the first appeal.

LAWRENCE, J.: In these cases, the questions to be decided are what is the meaning of the phrase "a controlling interest in a company," in the Finance Act, 1937, Sched. IV, paras. 4, 7 (*b*), 11. It was contended by counsel for the respondents in the first appeal, and by counsel for the appellants in the second appeal, that the word "interest" in these contexts means a legal or equitable interest of a proprietary nature in the shares of the company sought to be taxed, and that directors of a company who had a controlling interest in the company sought to be

taxed only by holding a controlling interest in the shares of another company, which in turn held a controlling interest in the shares of the company sought to be taxed, had not a controlling interest within the meaning of the above-mentioned paragraphs of Sched. IV. They cited *Macaura* v. *Northern Assurance Co.* (1), which decides that a shareholder A
in a company has no insurable interest in the assets of that company, and also relied, among other statutes, upon the words of the Finance Act, 1920, s. 53 (2) (*b*), arguing that that section indicated that, if the legislature, in the Finance Act, 1937, had meant an indirect controlling interest, it would have said so. B

The Attorney-General, on the other hand, contended that the word "interest" is a word of wide connotation. He cited *Lapish* v. *Braithwaite* (2) and *Skinner* v. *A.-G.* (3), and contended that the words "controlling interest" must be interpreted together, that there can be no reason which could have induced the legislature to exclude the case of an C
indirect controlling interest, that the Finance Act, 1920, shows that the words can equally well be used to include an indirect or a direct controlling interest, and that in their ordinary meaning they include both.

I have come to the conclusion that the contention of the Crown is correct. I do not think that it is a proper inference that, because the D
Finance Act, 1920, mentions expressly a controlling interest, direct or indirect, when the legislature spoke of "a controlling interest" *simpliciter* in 1937, it meant only a direct controlling interest. The word "controlling" is not a term of art, nor is the word "interest" necessarily so, and, when the word "controlling" is used to qualify "interest," I think E
that the phrase in its ordinary meaning covers both direct and indirect control. Counsel for the appellants in the second appeal also argued that companies which held only 51 per cent. and less than 75 per cent. of the shares in a company have not a controlling interest in such company, but it was conceded that upon this point I am bound by the decision of F
ROWLATT, J., in *Mitchell* v. *Noble* (*B. W.*), *Ltd.* (4). The Crown's appeal will, therefore, be allowed, and the British American Tobacco Co.'s appeal will be dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants in the first G
appeal and for the respondents in the second appeal); *Richard Furber & Son* (for the respondents in the first appeal); *D. M. Oppenheim* (for the appellants in the second appeal).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

No longer of authority. Re WINGHAM (*decd.*). [1948] 2 All E.R. 908.

IN THE GOODS OF GIBSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.), **February 17, 1941.**]

Wills—Soldier's will—Actual military service—Officer living in own house near barracks—Death in air raid—Wills Act, 1837 (*c.* 26), *s.* 11.

The deceased was a regular officer in the Army Dental Corps. He happened to have a house of his own near the military camp in England where his duties had to be performed and was living there at the time of his death. He was killed in an air raid. He was not under orders to proceed abroad :

HELD : the deceased was not in actual military service within the meaning of the Wills Act, 1837, s. 11.

[**EDITORIAL NOTE.** It is said that the rule under which a soldier's will not in the statutory form may be admitted to probate is derived from the Roman law. The basis of the rule in that law was that the soldier was *in expeditione* and that he was *inops consilii.* The phrase *in expeditione* has been rendered in modern English by " in actual military service," and, for some long time the invasion of England was so unlikely an event that " actual military service " became synonymous with foreign service. During the last year or so, however, the invasion of England has been at least a probability, and it is said, therefore, that soldiers on service in this country must be said to be *in expeditione.* This argument receives considerable support from the fact that both soldiers and civilians in this country are subject to more or less continuous bombardment from the air. The matter, however, hardly rests there. There is the second reason for the rule, that the soldier was *inops consilii.* It is difficult to suggest that a soldier stationed in this country is not within easy reach of a solicitor, whom he can instruct to prepare a will in proper form, and, if it is said that he is in continuous danger from bombs dropped by aircraft, this is answered by the fact that civilians are in precisely the same position and the reason for any special privilege fails. This reason induced HENN COLLINS, J., to refuse the motion in the case here reported. It is understood, however, that some inquiry will be made of the military authorities as to when they consider or classify a soldier as on active service, and it may be that subsequent decisions may be based on the answer then received.

AS TO ACTUAL MILITARY SERVICE, see HALSBURY, Hailsham Edn., Vol. 14, p. 198, para. 325 ; and FOR CASES, see DIGEST, Vol. 39, pp. 333-335, Nos. 193-219.]

Cases referred to :

(1) *Bowles* v. *Jackson* (1854), 1 Ecc. & Ad. 294 ; 39 Digest 334, *201.*

(2) *Hiscock, In the Goods of,* [1901] P. 78 ; 39 Digest 334, *202* ; 70 L.J.P. 22 ; 84 L.T. 61.

MOTION on behalf of the sister of the deceased asking for a grant of administration with the will annexed of the estate of the deceased, Colonel Arnold Gibson. The deceased was killed during an air raid on Oct. 4, 1940, when his house was demolished by a bomb. The next-of-kin, the mother of the deceased, consented to the application. The deceased was a lieutenant-colonel in the Army Dental Corps, attached to the Eastern Command Headquarters at Hounslow and was, at the time of his death, living in his own house at Richmond, Surrey.

Victor Williams, for the applicant. The deceased was in actual military service within the meaning of the Wills Act, 1837, s. 11. The whole of this country was at the time of his death a battle zone. It is true that he was not under orders to proceed abroad, but that is not necessary where there is an apprehension of invasion and, in fact, invasion by air. During this war, Military Crosses have been awarded for service in England, and it is understood that that award is only made for service in face of the enemy. If it is said that the deceased was within reach of advice, then so also is a soldier about to be embarked for foreign service, who was held to be in actual military service : *In the Goods of Hiscock* (2). In the circumstances of this case and of the present war, the deceased was in actual military service.

Henn Collins, J. : It is going too far to accede to this motion, because, if I did accede to it, every home guard will be entitled to the privileges given by the section. It is very far removed from the rule in Roman law, and, when all the civilian amenities which were available to the deceased are considered, it would be going against the principle laid down in the authorities to grant this motion. I can understand the privilege being extended to a man mobilised for service abroad or told to go to a certain place for embarkation, but a soldier who is carrying out peace-time duties, although he is under military authority, is no more a fighting soldier because he is in the Army than an ordinary civilian, who, in the circumstances of the present war, may be said to be in the front rank of the fighting. The foundation of the rule is that a man is parted from civil surroundings and the deceased never was. In *Bowles* v. *Jackson* (1), a soldier under orders to proceed from his station in one Indian presidency to take part in the war going on in another, and making his will only two days before he commenced the march, was held not to be entitled to the privilege of a military testament. In the circumstances, the motion must be refused, but the applicant is entitled to her costs as between solicitor and client out of the estate.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Henry F. Galpin*, Oxford (for the applicant).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

HOANI TE HEUHEU TUKINO v. AOTEA DISTRICT MAORI LAND BOARD.

[PRIVY COUNCIL (Viscount Simon, L.C., Lord Thankerton, Lord Wright A and Lord Porter), **November 11, 14, 15, 18, 19, 22, 1940, April 3, 1941.**]

Privy Council—New Zealand—Native lands—Charge on lands—Statutory charge—Validity—Claim for indemnity—Power of legislature of New Zealand to impose charge—Power to legislate in derogation of treaty right— B *Treaty of Waitangi,* 1840*—New Zealand Constitution Act,* 1852 (*c.* 72), *ss.* 53, 72, 73*—New Zealand Constitution* (*Amendment*) *Act,* 1857 (*c.* 53)*— Colonial Laws Validity Act,* 1865 (*c.* 63)*—Native Land Act* (*New Zealand*), 1873*—Native Purposes Act* (*New Zealand*), 1935, *s.* 14.

The appellant is the chief of the Ngatituwharetoa, a Maori tribe whose members own lands in New Zealand which, by virtue of the Native Purposes Act, 1935, s. 14, were charged with repayment to the respondent C board of a portion of a sum of £23,500 which had been paid by the latter to the Egmont Box Co., Ltd. The purpose of the proceedings was to obtain a declaration that the statutory charge imposed upon the lands of the native owners by the Act of 1935 was void. The appellant contended that the respondent board, as the statutory agents of the native owners, owed a duty to them to safeguard their interests, that the board had acted D in breach of that duty, and that, in consequence of that breach of duty, sect. 14 of the Act of 1935 had been enacted. He asked for a declaration and an order requiring the respondents to indemnify the native owners and their lands against the payment of the sum of £23,500. The alternative contention challenged the validity of the charge imposed by sect. 14 of the Act of 1935, on the ground that such legislation was *ultra vires* the legislature of New Zealand, inasmuch as it derogated from the rights E conferred on the native owners by the Treaty of Waitangi, 1840 :—

HELD: (i) it was not open to the court to go behind what had been enacted by the legislature and inquire how the enactment came to be made. The court had to accept the enactment as the law unless and until the legislature itself altered such enactment.

F (ii) it was clear that the claim could not rest on the Treaty of Waitangi. There must be some statutory recognition of the right claimed, and the appellant had failed to show that the enactment of the statutory charge in sect. 14 of the Act of 1935 was beyond the competency of the New Zealand legislature.

G [**EDITORIAL NOTE.** A statute which has been duly enacted by Parliament cannot be impeached as having been improperly procured or as not being in accordance with rights acquired by treaty or otherwise. Once the statute is duly passed, the courts must give effect to it, and the remedy of anyone who considers that the statute improperly affects his rights is to use such constitutional means as exist to obtain its repeal or modification.

H AS TO IMPEACHING A STATUTE, see HALSBURY, Hailsham Edn., Vol. 31, p. 491, para. 622 ; and FOR CASES, see DIGEST, Vol. 42, pp. 611-613, Nos. 119-137.]

Cases referred to :

(1) *Labrador Co.* v. *R.*, [1893] A.C. 104 ; 42 Digest 611, *118* ; *sub nom. Labrador Co.* v. *R.*, *R.* v. *Labrador Co.*, 62 L.J.P.C. 33 ; 67 L.T. 730.

(2) *Vajesingji Joravarsingji* v. *Secretary of State for India* (1924), L. R. 51 Ind. App. 357 ; Digest Supp.

(3) *Cook* v. *Sprigg*, [1899] A.C. 572; 17 Digest 453, *215*; 68 L.J.P.C. 144; 81 L.T. 281.

(4) *Secretary of State for India* v. *Kamachee Bai Rajbai* (1915), 42 Ind. App. 229.

APPEAL from an order and judgment of the Court of Appeal of New Zealand, dated Oct. 22, 1938, which dismissed an appeal from the judgment of the Supreme Court of New Zealand, dated Dec. 2, 1937, whereby judgment was entered for the respondent board. The facts are fully set out in the judgment of their Lordships delivered by VISCOUNT SIMON, L.C.

M. H. Hampson, *Hon. H. L. Parker* and *J. Christie* for the appellant.

A. T. Denning, K.C., and *J. Pennycuick* for the respondents.

VISCOUNT SIMON, L.C.: This is an appeal from an order and judgment of the Court of Appeal of New Zealand, dated Oct. 22, 1938, which dismissed an appeal from the judgment of SMITH, J., dated Dec. 2, 1937, whereby judgment was entered for the defendant board, the respondents before us. The appellant is the chief of the Ngatituwharetoa, a Maori tribe whose members own lands in New Zealand which were charged, by virtue of the Native Purposes Act, 1935, s. 14, with repayment to the respondent board of a portion of a sum of £23,500 which had been paid by the latter in terms of the section to the Egmont Box Co., Ltd. The appellant instituted the present proceedings on behalf of the tribe, and as representing the owners of the lands, against the respondent board in the Supreme Court of New Zealand.

The Native Purposes Act, 1935, s. 14, which replaced a substantially similar provision in the New Zealand Finance Act, 1934-1935, s. 10, so far as here material provides as follows:

> (1) The Aotea District Maori Land Board (hereinafter in this section referred to as the board) is hereby authorised, empowered and directed to accept the offer of the Egmont Box Co., Ltd., to release and discharge the board and the native owners from all claims and demands of whatever kind arising out of a certain agreement made between the Tongariro Timber Co., Ltd., and the said Egmont Box Co., Ltd., dated Oct. 23, 1919 (including all amounts which the said Egmont Box Co., Ltd., claims to be entitled to set off against royalties payable), in respect of timber-cutting and other rights on the lands known and described in the said agreement as Western Division A and B, in consideration of a sum approved by the Native Minister to be paid to the said Egmont Box Co., Ltd., by the board. (2) (A) The sum approved by the Native Minister, together with all costs and expenses incurred by the board in connection with its negotiations with the Egmont Box Co., Ltd., and incidental hereto, shall be paid by the board out of moneys in its account, and shall be deemed to be a loan to the owners, including the Crown, of the whole lands described and referred to in a certain deed of agreement bearing date Dec. 23, 1908, and made between the Maniapoto-Tuwharetoa District Maori Land Board of the one part and the Tongariro Timber Co., Ltd., of the other part, such deed being the deed entered into in pursuance of the Maori Land Laws Amendment Act, 1908, s. 37, excepting always, however, from such lands all such portions thereof as have been actually transferred to the Tongariro Timber Co., Ltd., for an estate in fee simple. (B) Upon payment of such sum as aforesaid the board shall by virtue of this Act and as security for the repayment of such sum together with the other moneys mentioned in para. (A) hereof (all hereinafter in this section referred to as the loan moneys) and together with interest thereon as hereinafter mentioned, be deemed to have a charge upon all the lands and the revenue therefrom referred to in para. (A) hereof, excepting any of such land or any interest therein acquired or owned by the Crown . . . (8) The board shall be entitled to charge and be paid interest at a rate not exceeding 5 per cent. per annum on the said loan-moneys until repayment thereof,

> such interest to be charged as from the respective dates each or any portion of such loan-money is paid out. (9) The expenditure hereby authorised shall be deemed to be a proper investment by the board of its funds and such investment is hereby approved. (10) Upon payment to the Egmont Box Co., Ltd., of the said sum, the agreement between the Tongariro Timber Co., Ltd., and the Egmont Box Co., Ltd., dated Oct. 23, 1919, shall be deemed to be determined and cancelled, and any right title or interest acquired thereunder by the Egmont Box Co., Ltd., shall pass to and vest in the board. (11) Upon payment of the said moneys due and owing by the Tongariro Timber Co., Ltd., to the Egmont Box Co., Ltd., upon any account whatsoever, including moneys which the Egmont Box Co., Ltd., has paid or may hereafter pay in respect of its liability as guarantor under debentures issued by the Tongariro Timber Co., Ltd., for £26,000 shall be deemed to be due and owing by the Tongariro Timber Co., Ltd., to the board, and the Egmont Box Co., Ltd., shall at the cost of the board, assign to it all securities it may hold for the payment of any such moneys.

In accordance with these provisions, the Egmont Box Co., Ltd., made an offer to accept the sum of £23,500, and the Native Minister approved this amount and directed the respondent board to pay it, which they did upon June 25, 1935, and such sum thereupon became a charge upon the lands referred to in the agreement of 1908 other than those owned by the Crown as provided by sect. 14 (2). Thereafter, the present proceedings were instituted by the appellant, and, as was clearly stated by his counsel, to whom their Lordships are indebted for a full and able argument, the whole purpose of the proceedings is to obviate the statutory charge imposed upon the lands of the native owners by the Act of 1935, and it is sought to attain that end by one of the two alternative contentions maintained before the board. Counsel also stated that the native owners took the view that the Act of 1935 imposed a liability on the Egmont Box Co., Ltd., for which there was no justification, and their Lordships note that SMITH, J., who tried the case, says in his judgment :

> Although I do not think that there is any doubt about the legal position, counsel for the defendant agreed with counsel for the plaintiff that the natives represented by the plaintiff had cause to feel a sense of injustice.

However, it is not within the province of this Board to criticise the policy of the legislature. The Board's duty is to construe and apply the enactments made by the legislature.

The first contention submitted by the appellant was that relied on in the statement of claim in its final amended form, dated July 2, 1937—namely, that the respondent board, as the statutory agent of the native owners, owed a duty to them to safeguard their interests, that the board had acted in breach of that duty, and that, in consequence of that breach of duty, sect. 14 of the Act of 1935 had been enacted. The appellant asked for the appropriate declarations and for an order requiring the respondent board to indemnify the native owners and their lands against the payment of the sum of £23,500 which the board had paid to the Egmont Box Co., Ltd., or any part thereof. The alternative contention of the appellant challenged the validity of the charge imposed by sect. 14 of the Act of 1935, on the ground that such legislation was *ultra vires* the legislature of New Zealand, inasmuch as it derogated from the rights conferred on the native owners by the Treaty of Waitangi. This contention was not raised on the pleadings or before the Supreme Court, but it was heard and decided by the Court of Appeal without objection. On the suggestion of their Lordships, counsel for the appellant has submitted an amendment to the prayer in the statement of claim in the following terms:

> 2 (*a*) For a further declaration by the honourable court that so much of the Native Purposes Act, 1935, s. 14, as imposes a charge on the lands of the natives is *ultra vires* the legislature of New Zealand. A

Counsel for the respondent board assents to the making of the amendment, and the scope of the argument presented before their Lordships is regularised by its allowance. B

Before dealing with these contentions, it will be convenient to give a brief outline of the events which led up to the Act of 1935. In 1908, the Maniapoto-Tuwharetoa District Maori Land Board—the predecessors of the respondent board—as authorised by the Maori Land Laws Amendment Act, 1908, s. 37, on behalf of the native owners of the lands in C question, entered into an agreement with the Tongariro Timber Co., Ltd., under which the company was to buy the timber on the lands and pay royalties in advance on account thereof, and was also to build a railway for a distance of about 40 miles through the lands within certain prescribed periods. The Tongariro company subsequently found difficulty in D carrying out its obligations, and in 1914 and 1919 it made agreements with the Egmont Box Co., Ltd., under which it obtained assistance from the Egmont company. At the same time, statutory provisions were passed which provided that, in the event of default by the Tongariro company in its obligations to the respondent board, the rights and obliga- E tions of the Tongariro company under its agreements with the Egmont company were to be transferred from the Tongariro company to the board. In 1930, owing to the defaults of the Tongariro company, the board cancelled the agreement between them, and questions then arose between the board and the Egmont company, the latter claiming that the F Tongariro company was indebted to it in an amount exceeding £46,000, and that the liability had been transferred to the board under the statutory provisions of 1914 and 1919.

In the hopes that a solution might be provided by negotiation, the Native Land Amendment and Native Land Claims Adjustment Act, 1930, G s. 18, provided, *inter alia*, that the respondent board should be authorised to enter into a new contract with the Egmont company incorporating such terms of the 1919 agreement as should be mutually agreed upon, with such additional terms as should, in the opinion of the respondent board, subject to the approval of the Native Minister, be fair, reasonable H and equitable. If any dispute was to arise as to the terms to be included in the new agreement, the decision of the Native Minister was to be final, provided that, if the Egmont company was dissatisfied with the Native Minister's decision, it could decline to execute the proposed contract, and the parties were thereupon to be left to their respective rights and obligations under the agreement of 1919. It was further provided that, if no new contract was entered into under the Act, the respondent board should remain the statutory agent of the native owners, with as full authority to act as if it were the legal owner of the premises.

No new agreement was arrived at or executed, and thereupon the Finance Act, 1934-1935, s. 10, was passed, but was shortly thereafter superseded by sect. 14 of the Act of 1935, and the statutory charge on the lands followed, against which the appellant seeks to be indemnified by the respondent board. In his statement of claim, the appellant embodies his allegation of breach of duty by the respondent board as the statutory agent of the native owners in his prayer:

> (1) For a declaration by this honourable court that the defendant board's failure (*a*) to obtain from this honourable court directions as to the legal liability (if any) of the defendant board and/or the native owners aforesaid to the Egmont Box Co., Ltd.; or in the alternative (*b*) to terminate the contract of the Egmont Box Co., Ltd., and sue for damages, was negligence and/or breach of duty. (2) For a further declaration by this honourable court that the defendant board's failure to represent to the Crown that it would be wrong to make any settlement with the Egmont Box Co., Ltd., which involved the payment of moneys to be charged on the aforesaid lands until the liability of the native owners for any of such moneys had first been determined by this honourable court, was negligence and/or breach of duty.

Their Lordships fully agree with the opinion of the Court of Appeal on this contention of the appellant. It is not open to the court to go behind what has been enacted by the legislature and to inquire how the enactment came to be made, and whether it arose out of incorrect information, or, indeed, out of actual deception by someone on whom it placed reliance. The court must accept the enactment as the law unless and until the legislature itself alters such enactment on being persuaded of its error. The principle laid down in *Labrador Co.* v. *R.* (1), referred to by the Court of Appeal, is directly applicable. In delivering the judgment of the Board, LORD HANNEN said, at p. 123:

> This is an absolute statement by the legislature that there was a *seigneurie* of Mingan. Even if it could be proved that the legislature was deceived, it would not be competent for a court of law to disregard its enactments. If a mistake has been made, the legislature alone can correct it. The Act of Parliament has declared that there was a *seigneurie* of Mingan, and that thenceforward its tenure shall be changed into that of *franc aleu roturier*. The courts of law cannot sit in judgment on the legislature, but must obey and give effect to its determination.

Before the court can accede to the appellant's claim for an indemnity against the charge imposed by sect. 14 of the Act of 1935, it will require to find not only that the respondent board owed to the native owners the duty alleged and that it committed the breaches of that duty which are alleged, but also that the enactment of sect. 14 was the reasonable and natural consequence of such breaches, and, even assuming the duty and breaches to have been established, the third and last essential step for the appellant's success would involve an inquiry by the court of the nature prohibited by the principle of *Labrador Co.* v. *R.* (1). The appellant fails, therefore, in his first contention.

While the appellant's first contention assumed the legislative validity of the statutory charge enacted by sect. 14 of the Act of 1935 and sought a remedy by indemnification against the liability thus imposed, his alternative contention, which remains to be dealt with, challenges the power of the legislature of New Zealand to impose such a charge on the native lands. The appellant maintained (i) that the Treaty of Waitangi was a solemn compact defining the rights given to the Maori people in respect of their lands, (ii) that the right thus acquired by the Maori people is cognisable in the courts, (iii) that such right was declared by the New Zealand Constitution Act, 1852, which granted a representative constitution to New Zealand, (iv) that the Colonial Laws Validity Act, 1865, preserves such right, (v) that the New Zealand Constitution (Amendment) Act, 1857, which amended the Act of 1852, did not authorise the Parliament of New Zealand to legislate in derogation of a treaty right, and (vi) that the legislature of New Zealand has recognised and adopted the treaty as part of the municipal law, and that sect. 14 of the Act of 1935 derogates from the right conferred by the second article of the treaty, inasmuch as it imposes a charge on the native lands. Art. 2 of the Treaty of Waitangi, which was dated Feb. 6, 1840, was as follows :

> Her Majesty the Queen of England confirms and guarantees to the chiefs and tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession ; but the chiefs of the united tribes and the individual chiefs yield to Her Majesty the exclusive right to pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Under art. 1 there had been a complete cession of all the rights and powers of sovereignty of the chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in the municipal law. The principle laid down in a series of decisions was summarised by LORD DUNEDIN in delivering the judgment of this Board in the Gwalior case, *Vajesingji Joravarsingji* v. *Secretary of State for India* (2), at p. 360 :

> When a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties. This is made quite clear by LORD ATKINSON when citing the Pondoland case of *Cook* v. *Sprigg* (3), he says (*Secretary of State for India* v. *Kamachee Bai Rajbai* (4), at p. 268) : " It was held that the annexation of territory made an act of state and that any obligation assured under the treaty with the ceding state either to the sovereign or to the individuals is not one which the municipal courts are authorised to enforce.

So far as the appellant invokes the assistance of the court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the court to some statutory recognition of the right claimed by him. He therefore refers to the New Zealand Constitution Act, 1852 under which representative government was conferred on New Zealand by the creation of a legislative body called the General Assembly, the powers of which, so far as material to the present question, are provided for in sects. 53, 72 and 73 as follows:

> 53. It shall be competent to the said General Assembly (except and subject as hereinafter mentioned) to make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the law of England . . .
>
> 72. Subject to the provisions herein contained, it shall be lawful for the said General Assembly to make laws for regulating the sale, letting, disposal, and occupation of the waste lands of the Crown in New Zealand; and all lands wherein the title of natives shall be extinguished as hereinafter mentioned, and all such other lands as are described in an Act of the Session holden in the tenth and eleventh years of Her Majesty, c. 112, to promote colonisation in New Zealand, and to authorise a loan to the New Zealand Co., as demesne lands of the Crown, shall be deemed and taken to be waste lands of the Crown within the meaning of this Act, provided always that, subject to the said provisions and until the said General Assembly shall otherwise enact, it shall be lawful for Her Majesty to regulate such sale, letting, disposal and occupation by instructions to be issued under the signet and royal sign manual.
>
> 73. It shall not be lawful for any person other than Her Majesty, her heirs and successors, to purchase or in anywise acquire or accept from the aboriginal natives land of or belonging to or used or occupied by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal natives in any such land as aforesaid: and no conveyance or transfer, or agreement for the conveyance or transfer, of any such land, either in perpetuity or for any term or period either absolutely or conditionally, and either in property or by way of lease or occupancy, and no such release or extinguishment as aforesaid shall be of any validity or effect unless the same be made to, or entered into with, and accepted by Her Majesty, her heirs or successors . . .

The appellant's contention was that the right conferred by the Treaty of Waitangi was made a substantive part of the municipal law by sect. 73, but he had to concede that the Imperial Parliament, by virtue of its sovereign power of legislation, might have altered any right recognised or conferred by sect. 73 by enacting a few months later a provision in the precise terms of sect. 14 of the New Zealand Act of 1935. In view of this admission—which, in the opinion of their Lordships, was rightly made—the only ground left on which the appellant can challenge the validity of sect. 14 is that the Imperial Parliament has not conferred upon the New Zealand legislature the power to alter sect. 73 of the Act of 1852. However, this ground also fails, since, while sect. 73 of the Act of 1852 was expressly excepted from the power of alteration and repeal of the provisions of that Act conferred by the amending Act of 1857, the Imperial Parliament passed an Act in 1862 which enabled the Assembly to repeal sect. 73 of the Act of 1852, and which provided that no enactment of the Assembly should be invalid because of repugnancy to sect. 73. If it were needed to rely on them, the provisions of the Colonial Laws Validity Act, 1865, operate to the same effect.

If, then, as appears clear, the Imperial Parliament has communicated to the New Zealand legislature power to legislate in regard to the native lands, it necessarily follows that the New Zealand legislature has the same power as the Imperial Parliament had to alter and amend its legislation at any time. In fact, as pointed out by the Chief Justice, sect. 73 of the Act of 1852 was repealed by the New Zealand legislature by the Native Land Act, 1873. As regards the appellant's argument that the New Zealand legislature has recognised and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the treaty in the statutes, but these appear invariably to have had reference to further legislation in relation to the native lands, and, in any event, even the statutory incorporation of art. 2 of the treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments.

In the opinion of their Lordships, the appellant has failed to satisfy them that the enactment of the statutory charge in sect. 14 of the Act of 1935 was beyond the competency of the New Zealand legislature, and the appeal fails on this point also. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs, and that the order and judgment of the Court of Appeal of New Zealand should be affirmed.

Appeal dismissed with costs.

Solicitors: *Coward, Chance & Co.* (for the appellant); *Biddle, Thorne, Welsford & Gait* (for the respondents).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

HUMBERSTONE ESTATES, LTD. *v.* ALLEN AND ANOTHER.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Oliver, J.), **April 29, 1941.**]

Emergency Legislation—Landlord and tenant—Lease granted in 1937 *assigned after outbreak of war—Whether assignment constituted new contract of tenancy—Courts (Emergency Powers) Act,* 1939 (*c.* 67), *s.* 1 (1), (2).

In Sept., 1937, the landlords granted a lease of certain premises to T. In Feb., 1940, T. assigned the lease to the appellants. The rent having fallen into arrear, the landlords took proceedings and obtained judgment in respect of two quarters' rent. They then sought to levy execution without leave, on the ground that the assignment of the lease and the payment of rent by the assignees (the appellants) to the landlords constituted a new contract of tenancy, which arose after the outbreak of the war:—

HELD: the assignment of the lease and the payment of rent by the assignees to the landlords did not create a new contract of tenancy. The rent was due under the terms of the lease granted in Sept., 1937, and the landlords could not proceed to execution on their judgment except after complying with the Courts (Emergency Powers) Act, 1939.

[**EDITORIAL NOTE.** This is a short but important and interesting point under the Courts (Emergency Powers) Act, 1939. The Act does not apply in cases where the contract sued on has been entered into after the date on which the Act came into force. It will be remembered that at common law a contract of tenancy could be created by the entering into possession of the premises and the payment of rent. It was here sought to extend or apply this doctrine to the case of an assignment and it was suggested that, when an assignee enters into possession and pays rent, there is a new contract with the landlord ; but it is a well-established principle that the assignee's liability to the landlord is based upon privity of estate and not on privity of contract. The doctrine here invoked was largely developed to obviate hardship arising from the absence of an instrument in writing or under seal which was necessary in the case of a lease, and it would have had no real application to an assignee who was in possession under an assignment by deed of the lease.

As to Relief under the Courts (Emergency Powers) Acts, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 946-950.]

Interlocutory Appeal by the assignees of a lease from an order of Hawke, J., dated Apr. 8, 1941.

In Sept., 1937, the landlords granted a lease to one Taylor at a quarterly rent of £106 5*s*. In Feb., 1940, Taylor assigned his interest under the lease to Humberstone Estates, Ltd. (in this report referred to as the assignees), and the assignees paid the rent which accrued due on Mar. 25, 1940 and June 24, 1940. They failed to pay the rent due on Sept. 29, 1940, and that due on Dec. 25, 1940, and the landlords thereupon recovered judgment for the rent due in respect of those two quarters. The landlords then sought to proceed to execution without obtaining the leave of the court under the Courts (Emergency Powers) Act, 1939.

W. A. L. Raeburn for the appellants.

C. G. Armstrong Cowan for the respondents.

Raeburn : The assignment was not a new contract entered into after the commencement of the Act, and leave to proceed to execution was required by the Courts Emergency Powers) Act, 1939. The assignment of the lease was not the contract upon which the judgment was obtained. There is no privity of contract between the landlords and the assignees.

Cowan : When the rent became in arrear, the landlord sued for it at the rate which the company had paid for the quarters ending Mar. 25, 1940, and June 24, 1940. Although the rent was in fact the same as that before the assignment the company, by entering into possession and tendering rent at a certain rate, created the relationship of landlord and tenant.

MacKinnon, J. : If it had not been for the war and the passing of the Courts (Emergency Powers) Act, 1939, the landlords would have been entitled, as landlords to distrain on these premises for the rent for those two quarters. If they had done so after the Act, they might have been in difficulty under sect. 1 (2) of the Act of 1939, which provides that persons shall not be entitled, except with the leave of the court, to proceed to exercise their remedy by way of levying a distress :

> . . . provided that this subsection shall not apply to any debt or obligation arising by virtue of a contract made after the commencement of this Act.

In the circumstances, if the landlords had distrained for the rent without obtaining the leave of the court, they would have had to contend that that debt for rent arose by virtue of a contract made after the commencement of the Act, and they would have had to establish that a contract between them and the assignees arose by virtue of the assignment in 1940. I think that it is quite impossible for any such contention to be set up. The contract under which the debt for rent arose was made in Sept., 1937, with Taylor. The landlords did not seek to distrain, but they brought an action for the rent and obtained judgment against the assignees for the rent for the two quarters. There then arose the question whether, in respect of that judgment, they were affected by sect. 1 (1) of the Act, which provides that one shall not proceed to execution of a judgment for the recovery of a debt unless it arose by virtue of a contract made after the commencement of the Act. I think that it is clear that this was a judgment for the recovery of a debt which became due by virtue of a contract made before the Act, and that the defendants do not bring themselves within the proviso to the subsection by alleging that it is for the recovery of a debt due by virtue of a contract made after the commencement of the Act. That being so, this appeal should be allowed.

Luxmoore, L.J.: I agree. Hawke, J., appears to have held that, by reason of the assignment of the original lease to the assignees by Taylor and the payment of rent by the assignees to the landlords, there was some new contract of tenancy between the landlords and the assignees. There can be no justification for such a view. The original lease was a contract between the landlords and Taylor. The assignment by Taylor of the benefit of that lease created no contractual relationship whatever between the landlords and the assignees. The landlords were entitled to sue the assignees for the rent reserved by the original lease by reason of the privity of estate—not by reason of a privity of contract—between themselves and the assignees. The only fact by reason of which it is said that the landlords are entitled to issue execution on their judgment is that it is a judgment for the recovery of a debt which became due by virtue of a contract made after the commencement of the Act. I think that the short answer to that is that nothing became due by virtue of any contract made after the commencement of the Act. What became due from the assignees to the landlords was the rent reserved by the original lease by reason of the privity of estate which arose when the assignment was made. That being so, I am satisfied that the landlords ought to be restrained from proceeding to execute the judgment or to enforce it in any way except after complying with the provisions of the Courts (Emergency Powers) Act, 1939.

Oliver, J.: I agree.

Appeal allowed with costs in both courts.

Solicitors: *Harringtons* (for the appellants); *Wetherfield, Baines & Baines* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

KING *v.* KING.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), **March 12, 13, April 1, 1941.**]

Divorce—Desertion—Agreement before marriage as to matrimonial home—Husband's attempt to change matrimonial home without justification.

Before the marriage which was here sought to be dissolved on the ground of desertion, the wife was engaged in trade, and residence in a certain house was essential to the continuance of the wife's business. The parties for that reason agreed that they would live in that house. After the marriage the husband moved to another house and tried to compel his wife to join him there, but when she refused, alleged that she was guilty of desertion :—

HELD : in the circumstances, the wife had good cause for her refusal and was not guilty of desertion, but the husband had been guilty of desertion.

Mansey v. *Mansey* (2) *distinguished.*

[**EDITORIAL NOTE.** In normal circumstances the husband has the right to choose where the matrimonial home shall be, but in all cases he must in this respect act reasonably. Where he has agreed before marriage that the wife shall continue her own business and, for that purpose, to make the matrimonial home at the place where that business is being carried on, it is unreasonable for him to go back on that agreement without good cause. However, it is doubtful whether this case, or, indeed, that of *Mansey* v. *Mansey* (2), which is here distinguished, are really based upon any right to choose the *locus* of the matrimonial home. They are rather applications of the ordinary principles of the doctrine of desertion to special circumstances. That doctrine requires that the parties shall act reasonably and it would seem that an unreasonable attempt to change the matrimonial home may amount to desertion, while, on the other hand, there may be many cases where such a change is quite reasonable, and, indeed, justified, and then no case of desertion is established.

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-658, paras. 963-967 ; and FOR CASES, see DIGEST, Vol. 27, pp. 307-316, Nos. 2840-2939.]

Cases referred to :

(1) *Fender* v. *St. John-Mildmay*, [1938] A.C. 1 ; Digest Supp. ; *sub nom. Fender* v. *Mildmay*, [1937] 3 All E.R. 402 ; 106 L.J.K.B. 641 ; 157 L.T. 340.

(2) *Mansey* v. *Mansey*, [1940] P. 139 ; [1940] 2 All E.R. 424 ; Digest Supp.

HUSBAND'S PETITION for dissolution of the marriage on the ground of desertion, with a cross-petition in the wife's answer denying desertion and asking for a dissolution of the marriage on the ground of the husband's desertion. The facts are fully set out in the judgment.

William Latey for the petitioner.

H. Malone for the respondent.

LORD MERRIMAN, P. : This is a petition by the husband for dissolution of the marriage on the ground of desertion, with a cross-prayer in the wife's answer, whereby she denies the desertion and asks for dissolution of the marriage on the ground of the husband's desertion. It is important, having regard to the fact that the statutory period is one of 3 years, to observe that the petition is dated May 2, 1940, and that the wife's answer is dated June 13, 1940 ; for it follows that the husband has to prove that, by the beginning of May, 1937, the wife had deserted him, whereas she has only to prove that she was deserted not later than June 13, 1937.

The husband was 73 and the wife was 37 years of age. The husband had been married before, but his first wife had died some little time before the date of this marriage, which was celebrated on Aug. 22, 1936. He and his second wife lived in the same neighbourhood in Cornwall, where he owned a house named Redlands which had been his earlier matrimonial home. The wife, on the other hand, was living in a house and land named Pen-Kyrle, owned by her father, and was conducting at least three businesses there. The husband had retired from the service of a railway company, and had no business reason of any sort or kind for wishing to live in a particular district, or in a particular house in a particular district. The wife, on the other hand, as I have already said, was occupying this bungalow which belonged to her father, on which he had spent money on her behalf, and which was her means of livelihood. During the summer holidays she used to take 6 paying-guests. She also ran a small milk business by keeping cows on the land, and she grew fruit and flowers for the market. The husband had a son by a former marriage. There was no suggestion of any undertaking in connection with this second marriage that the husband should make any permanent financial provision for the wife, and I understand that she was left in complete ignorance as to whether he even intended to leave her anything under his will. In these circumstances, there being no pretence on either side that the marriage was one of very ardent affection, the wife naturally thought about her future. Her future was bound up with this bungalow, and, unless she could keep those activities, as she saw it at the time of the marriage, she might be left completely destitute, in the event, which could not be very long delayed, as compared with ordinary married life, of her husband's death. Accordingly, she stipulated that the matrimonial home should be at the bungalow, and not at the husband's house, and I am satisfied that she made it perfectly clear that she would not consent to marry the husband except upon that condition. It is not disputed that the husband accepted the condition without any qualification whatever, and he did so because he knew that, unless that was the understanding or bargain about the matrimonial home, she would have refused to marry him. The wife made it quite clear in her evidence—as, indeed, she had done in some letters—that she regarded it as a vital arrangement, and that she would not agree to marry on any other terms.

At the very outset of his evidence, the husband made this observation :

> I always had it at the back of my mind that I should afterwards get back to my own house, which was only a mile away.

I have not the slightest doubt that he was telling me the truth when he said that, but that statement, coupled with what I now know was the understanding, is, I think, extremely significant, because I have come very definitely to the conclusion that the husband meant to get out of this bargain at the earliest convenient moment. Let me say, however, that, before that moment arrived—and this is another clear confirmation of the existence of the understanding, if any such were required—on Oct. 1, 1936, about 6 weeks after the marriage, he had signed a tenancy agreement with the wife's father for this bungalow. He and the wife were both parties to the agreement as tenants, and it was an agreement for a tenancy from year to year.

That was the state of things in which the marriage took place, and the parties did in fact live at the bungalow throughout the autumn of 1936, except that from time to time the husband used to go away to his own house, Redlands, or to stay at one place or another, but he always came back again, and there was nothing wrong about that. However, even if the husband had not—as I think he had—made up his mind beforehand to get out of this arrangement at the earliest possible moment, he very soon made up his mind after the marriage. Early in 1937 he brought things to a head, and in effect insisted that the wife should leave the bungalow and come to live with him at Redlands. This is what happened. The husband having delivered this ultimatum, for it was no less, to his wife, and the wife having insisted on sticking to the arrangement which they had made, the husband asked for the return of a ring belonging to his first wife, which he had allowed the wife to use, and at the same time handed back to her his key of the bungalow.

It strikes one on the face of it, as counsel for the respondent said, that there is an air of finality about both those acts, which took place at about the same time. I think that that is beyond dispute. It was quite clear that the husband was prepared to admit that, if both those acts were not done actually at the same time, they must have been done at or about the same time. It is perfectly plain that this was because the husband, without any sort of agreement on the wife's part, and without really consulting her wishes in the matter at all, had decided for his own part that for the future he intended to live, with or without his wife, at Redlands. He would live with her if she would come, and without her if she would not, and he was taking up the attitude that he had the absolute right to dictate to her in the matter.

I think that the arrangement at which the parties had arrived about living at the bungalow was, in the circumstances, an eminently reasonable one. The house was in every way suitable, and, as I have already said, there was a valid business reason why it should be chosen as the matrimonial home, whereas there was no valid, practical business reason why Redlands should be chosen. In other words, there was a very sensible reason for the arrangement at which they had arrived. With one exception, to which I must allude, nothing had occurred, so far as I can see, to affect the validity of the arrangement. The only thing which affected it in any way—though even that did not, I think, affect it in any material degree—was the fact that the wife had been ordered for the time being to discontinue the hard work involved in looking after her five or six cows because of a slight recurrence of a haemorrhage from which she had previously suffered. Save for that, the circumstances remained exactly as they were, and in particular, at that time of year, her cows were the definite concern which required her attention. The question whether or not guests would be taken during the next summer would depend upon circumstances. The wife had no intention of keeping the guest house going to capacity, because that would not be possible, having regard to the fact that the husband was living in the house, but, at any rate, she would have been able to keep the connection together, whereas it would be lost altogether if she gave up the bungalow and went to Redlands.

In that state of things, as I say, in defiance of the understanding at which they had arrived, the husband took it upon himself to dictate that for the future the matrimonial home should be Redlands. I use the word "dictate" advisedly, because counsel for the petitioner, who has argued his case most forcefully, took the same stand, and said that the husband did dictate, because he was entitled to do so. However, if it were necessary to find documentary evidence of that, it would appear from the first letter the husband wrote to the wife :

> I think it well to put in writing just what the position is that unfortunately, I find myself in, towards yourself. First, it was only after living in your bungalow that I experienced how uncomfortable it is, owing to draughts and damp.

I am quite satisfied that that was not a genuine reason. The letter continues as follows :

> . . . and that, as you know after many talks I decided to live at my house, where I did my utmost to persuade you to join me, but to no avail.

I think that I am right in saying that that letter was unprompted by legal advice, because I have been given the date when the husband consulted his solicitor. At any rate, that letter has the merit of stating the husband's case very clearly and forcibly, so that the process of putting the wife in the wrong, which was afterwards carried still further, already begins, and the husband puts down everything which will look well on paper for him, and ill for her. Then finally he says :

> I enclose you £1 which is the amount I propose giving you per week, for the time being.

The wife replied that it was a lie to say that the house was damp. She said : "you know it is as dry as a bone." As I have said already, I think that that was only a pretext. She concluded :

> I know you are happy at Redlands, so there is no more to be said. I wish you every happiness.

Then on Mar. 30, under the supervision of his solicitor, the husband wrote a letter which I do not intend to read in full, but in which he said :

> We have been married now 7 months and for only about 4 months have we lived together as you have insisted so definitely that at whatever cost you are going to stay on at the bungalow and definitely not coming to live at Redlands, on which you know I have been so keen. When we agreed to part by my going to live again at Redlands I gave you an allowance of £2 (subsequently reduced to 30*s*. and then £1) per week, hoping that you would alter your very definite decision which you then

> made and about which there was no possible doubt, namely, that you would never come and live with me at Redlands, which house, as you know very well, is in every way a far more luxurious and comfortable home compared with your small bungalow.

I think one detects the unseen hand in the drafting of that paragraph. There is no doubt about how it came to be worded in that way. Then the next paragraph I do not think I need read, but the sting is in the beginning of a later paragraph :

> I am able to give you a perfectly adequate housekeeping allowance, but candidly I do not think you can expect me to continue to maintain you in your own home, when I have a perfectly good house, *and large garden*, within one mile of the bungalow.

The words "and large garden" were intended to indicate that she could transfer her flower business to his house. The letter continues as follows :

> Will you therefore let me know definitely whether your decision is still as it has always been, and that you will never live at Redlands as I naturally wish to know one way or the other. I am sending you a further £1 for this week's voluntary allowance pending my hearing from you.

I have no doubt whatever that the husband's whole object in writing that letter was to get rid of any further financial liability to his wife. He was guided by legal advice, evidently, upon the basis on which this case has been argued—namely, that in all circumstances a husband is entitled to dictate where the matrimonial home shall be, and that in this case he was entitled to put the wife in the position of forgoing all support from him if she did not instantly comply with his demands that she should leave the bungalow and come to Redlands. Incidentally, although he had given notice to quit, the tenancy agreement in regard to the bungalow had not yet expired, and, as I have already stated, in my opinion, there was no real change in the circumstances in which the bungalow had been chosen as the matrimonial home.

I am inclined to think that, if the matter had remained as it was when they went their several ways, the husband going to Redlands and the wife staying at the bungalow and writing to him to say that she hoped he would be happy at Redlands, and the husband saying in his letter of Mar. 30 that they agreed to part by his preferring to live at Redlands, it might, though I am not expressing any final opinion about it, have been difficult for either of them to assert desertion. After all, the wife had her agreement about where she should live. The husband, on the other hand, on the *prima facie* presumption, had the right of laying down where the matrimonial home was to be. Apparently, neither of them being prepared to give way, they had parted on the basis that they were both sticking to their position. However, this is not the case. There is a good deal more to it than that. Quite apart from the fact that the husband had already shown, by surrendering the key and by asking for the return of the ring, that he regarded the parting as final, I have evidence in this letter of Mar. 30 and in the husband's subsequent conduct which satisfies me that he was taking advantage of the fact that his wife was sticking to the arrangement in order to get rid of his obligations to her. I think that it is impossible to read this letter of Mar. 30 otherwise than as an ultimatum, almost as an invitation that the wife should stick to the decision which she had made, and that, if she did stick to it, as he expected that she would, then he had done with her for good, as far as any natural responsibility for her was concerned.

Directly after that, the husband left Redlands, and did not give his wife any address where she might communicate with him. In Aug., 1937, at any rate, his own solicitors wrote to say that they expected him to be leaving for Africa at any moment, or words to that effect. The wife always took her stand upon the basis that she had accepted him in marriage only on the understanding that they were to live at the bungalow.

I have to deal with the arguments which have been put forward by counsel for the petitioner on this basis. I ventured to express the view, with which counsel for the respondent, at any rate, now agrees, that both sides were putting their cases much too high. Counsel for the respondent said : " Here is a bargain which indeed was a vital condition on which this contract of marriage was based, with the corollary that, as soon as the husband broke the condition, the wife was entitled to break the contract, meaning, as I understand it, the contract of marriage." One cannot apply a rule of that sort to a contract like the contract of marriage, for reasons which it is obviously unnecessary to discuss. Whether or not that would have been an answer, for example, to a suit for breach of promise of marriage if the husband before marriage had shown an intention to go back on this arrangement is another point, and I need not go into that now. It is quite obvious that no such considerations can be invoked in respect of the contract of marriage itself after it has been entered into. When I say that, however, I must say that it seems to me that a way in which it can be put is this. This very clear and definite arrangement does at least avail her as an answer to a charge of desertion if she does not instantly comply with the demand by the husband—there being no change of circumstances—which is made in defiance of the arrangement to which they had come. In other words, I should have thought that at the very least it enabled this wife to say : " I have a perfectly good ground for refusing to go to Redlands, and you cannot turn me into a deserter by going back on your word for no reason whatever." I am bound to say that I should have very great difficulty, in the circumstances of this case, on any view of the matter, in finding that the wife deserted the husband because she took up this stand, unless it be, as counsel for the petitioner argued, that I have to ignore this agreement altogether as being contrary to public policy. I will deal with that presently. Of course, if I am not entitled to recognise the existence of this bargain or understanding as to where the matrimonial home should be, then the wife has no answer to the husband's demand, and she must comply with it. However, assuming that I am entitled to look at it, it seems to me that, in the circumstances, there is evidence of a reasonable excuse for the wife's refusal to comply with her husband's demand that she should give up her bungalow and go to Redlands, because that is where they had agreed not to live. Thus, subject always to the question of whether I can look at the agreement, I cannot see that the husband can possibly make out a case of desertion against the wife. The question whether the wife can make out a case of desertion against the husband is more difficult, and that brings me to the argument of counsel for the petitioner.

The argument of counsel for the petitioner can be put in two ways, or, rather, as embracing two propositions. First, the husband is entitled to dictate to his wife where the matrimonial home shall be. Secondly if any agreement to the contrary has been made before marriage, that is contrary to public policy, and cannot affect the matter one way or the other. I am going to take the latter first. I am bound to say that, although counsel for the petitioner has given me some weighty pronouncements on the subject of public policy, from very well-known authorities, none of them seems to come very near to this particular case. I think that the best expression of the principle is to be found in the opinion of LORD ATKIN in *Fender* v. *St. John-Mildmay* (1), at p. 12 ([1937] 3 All E.R., at p. 407), where he says that, besides being applicable to acts which are contrary to public policy, so that to do them is injurious to public interests, the doctrine is also applicable to arrangements which have harmful tendencies, although he points out that, whereas, in the case of agreements to do acts harmful of themselves, the judge can obtain some sort of a foothold, in the case of a harmful tendency the ground is less safe and more treacherous. Later he says, at p. 13 ([1937] 3 All E.R., at p. 408):

> But assuming, as we must, that the harmful tendency of a contract must be examined, what is meant by tendency ? It can only mean, I venture to think, that taking that class of contract as a whole the contracting parties will generally, in a majority of cases, or at any rate in a considerable number of cases, be exposed to a real temptation by reason of the promises to do something harmful, i.e., contrary to public policy ; and it is likely that they will yield to it.

I have asked in vain for any light on the harmful tendency of the particular bargain in this particular case, and, to put it quite plainly, the argument goes in a circle. It had already been stated that the husband was entitled to dictate, and that any agreement to the contrary must be contrary to public policy, and then, when I asked what harm there was in this particular agreement, I was told, in effect, that it stopped the husband from dictating. Thus, we do not really get any nearer the alleged vice of it. Of course, if this agreement meant that in all circumstances, and for all time, and whatever happened to this marriage, the wife was entitled to say, "I live at Pen-Kyrle, and I will never move," then there might be something to be said for the evil tendency of any such ante-nuptial bargain, but although the wife was inclined to put her case in words which could be interpreted as high as that, I do not think that that is the effect of this bargain. I think that it means, and could mean, no more than that, for perfectly good reasons which I have already explained and which are common to both sides, the parties agree that, *rebus sic stantibus*, that house was the proper matrimonial home. I think that it means that and nothing more. It does not mean that the wife was entitled to dictate where the matrimonial home was to be if the good reasons upon which the agreement was based ceased to exist, or if some changed circumstances gave good reason for a change in the matrimonial home. The wife's reactions to this demand of the husband were never tested in the light of that because no change had occurred, but the husband had insisted, and was advised to insist, on his right to dictate where the matrimonial home should be, and he took full advantage of that, in order to drive the wife into a position in which she would be unable to claim any maintenance from him. Then he disappeared, and meant to disappear, from her ken for ever. I think that in doing so he has afforded evidence on which I am entitled to think, as I do think, that from an earlier date than that upon which he actually was about to go to South Africa, which must have been some time in August, and from a date not later, at any rate, than the end of March or the beginning of April, he had decided that this marriage had come to an end so far as he was concerned, and he meant to put an end to it.

There is only one other thing to which I wish to refer, and I think that I ought to refer to it specifically as one of the reasons why I accept the wife's version of this story and reject the husband's. When the wife was served with the petition in May, 1940, she wrote the husband a letter on May 19. The husband was taken through that letter by counsel for the respondent. It is the plainest possible allegation that he had broken his promise on which the marriage took place. He broke a promise but for the making of which he knew she would not have married him. In that letter, the wife said that he had left her, that he had lied to people about the reason for doing so, saying that she had refused him conjugal rights, and that it was a lie that she had deserted him. There was no single one of those statements which counsel for the respondent put to the husband categorically which he was really prepared to deny was true. The only qualification he made was about their sexual relations, with regard to which it was quite untrue, of course, to say that she had refused him sexual relations. His only qualification was that, rather to his distaste, he had been asked to use contraceptives. Whatever may be the law, speaking generally—and I do not in the least dissent from the pronouncement on the subject made by Henn Collins, J., in *Mansey* v. *Mansey* (2) that the husband has the right to say where the matrimonial home shall be—I do not think that, in the circumstances of this case, the husband had the right to go back on the understanding for no valid reason whatever, and then to use that as an excuse for trying to put the wife in the wrong, as he did, nor had he any right, having, as he thought, put the wife in the wrong, then to make up his mind to disappear from her life for ever. It was when that latter stage occurred, I think, that he was guilty of desertion, and so I hold.

Decree nisi granted on respondent's cross-petition.

Solicitors: *Peake & Co.*, agents for *Ratcliffe, Son & Henderson*, Falmouth (for the petitioner); *Burton, Yeates & Hart* (for the respondent).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

TATEM STEAM NAVIGATION CO., LTD. *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **March 28, 31, 1941.**]

Income Tax—Undistributed income—Company in which public substantially interested—Quotation in official list of stock exchange—Relative of person controlling company—Finance Act, 1922 (*c.* 17), *s.* 21—*Finance Act,* 1927 (*c.* 10), *s.* 31—*Finance Act,* 1936 (*c.* 34), *s.* 19 (2) (*a*).

The provisions of the Finance Act, 1922, s. 21, do not apply to a company in which the public are substantially interested. The public are stated to be substantially interested where shares controlling 25 per cent. of the voting power have been acquired unconditionally by the public and such shares have been the subject of dealings on a stock exchange in the United Kingdom and have been quoted in the official list of such a stock exchange. In the case of the appellant company the necessary number of shares were not held by the public unless the shares held by Mrs. B. were included. Mrs. B. was a niece of Lord G., one of the persons controlling the company, and at the material time held from 20,000 to 22,100 shares. Of these shares 16,000 were the gift of Lord G. and the remainder she purchased. All the shares were included in, and subject to, her marriage settlement. At certain times in 1914 and 1915, the shares had been quoted in the official list of the Cardiff Stock Exchange and at other times they were quoted under the heading of "other business done":—

HELD: (i) the company was one in which the public were substantially interested, because the shares subject to Mrs. B.'s marriage settlement, were acquired unconditionally by her and she was not a relative within the meaning of the section which defines a relative as a husband, wife, ancestor, lineal descendant, brother or sister.

(ii) the shares had been quoted in the official list of the Cardiff Stock Exchange, because the section only required that they should at some time have been quoted in that list and not necessarily during the year of assessment.

(iii) on the evidence, quotations of "other business done" and in the supplementary list are quotations in an official list within the Finance Act, 1922, s. 21 (6) as amended.

[**EDITORIAL NOTE.** The main contention here is as to what is a company in which the public are substantially interested. It was contended that the shares held by a niece of one of the persons admittedly controlling the company were not shares held by the public. This argument was strengthened by the fact that the shares had been, as to the greater number of them, a gift and were held by the trustees of the marriage settlement, one of such trustees being the person controlling the company. The decision, however, is based upon the terms of the section, which states that the shares should be held unconditionally, and, since the gift of the shares were subject to no condition, it was held proper to include them among the number held by the public.

As to Definitions in the Finance Act, 1922, s. 21, see HALSBURY, Hailsham Edn., Vol. 17, pp. 290, 291, para. 576 ; and for Cases, see DIGEST, Supp., Income Tax, Nos. 674r-674z.]

Case Stated under the Finance Act, 1922, s. 21, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The appellant company was incorporated on Oct. 18, 1909, under the Companies (Consolidation) Act, 1908, to carry on the business of shipowners. The authorised and issued capital of the company is £350,000, divided into 350,000 shares of £1 each with equal voting rights. The questions in issue are (i) whether the company is one in which the shares held by the public have, in the course of the year or other period for which the accounts have been made up, been the subject of dealings on a stock exchange in the United Kingdom, (ii) whether the shares of the company have been quoted in the official list of such a stock exchange, and (iii) whether the company is a company in which the public are substantially interested. If these conditions are fulfilled, the company is outside the provisions of the Finance Act, 1922, s. 21, by virtue of sect. 21 (6) of that Act, as amended. If the company were within sect. 21 (1), then its income for the years ending Mar. 31, 1935, Mar. 31, 1936, and Mar. 31, 1937, would be deemed to be the income of its members for the respective periods.

The commissioners held (i) that the shares of the company had, in the course of the relevant years, been the subject of dealings on a stock exchange in the United Kingdom, (ii) that the shares have been quoted in the official list of such a stock exchange, and (iii) that the company is not a company in which the public are substantially interested within the meaning of sect. 21 (6).

J. Millard Tucker, K.C., and *Terence Donovan* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

Lawrence, J. : This is an appeal from a decision of the Special Commissioners, and the question is whether, in the circumstances of this case, the appellant company is a company in which the public are substantially interested, and is, therefore, outside the provisions of the Finance Act, 1922, s. 21, by virtue of the Finance Act, 1922, s. 21 (6), as amended. The circumstances of the case are these. The appellant company is admittedly controlled by five persons, the greatest shareholder being Lord Glanely, but there are, apart from the 5 persons who control the company, some 310 other shareholders who altogether hold more than 25 per cent. of the voting power of the appellant company. Among these 310 is a Mrs. Blyth, who is Lord Glanely's niece, and who held at the material time between 20,000 and 22,100 shares. 4,000 of those shares, Mrs. Blyth herself had purchased and 16,000 were transferred by Lord Glanely to her as a gift in Mar., 1928, and were settled by her on the terms of her marriage settlement. In 1936, Mrs. Blyth purchased a further 2,100 shares from her mother, Mrs. Gibson, and those shares were added to the 20,000 shares which were already comprised in her marriage settlement. The question which has to be decided is whether the 25 per cent. of the shares in the appellant company which are so held by the 310 shareholders, including Mrs. Blyth, constitutes a substantial interest in the company by the public within the meaning of the Finance Act, 1922, s. 21 (6), as amended. That section provides that the section:

> . . . shall apply to any company which is under the control of not more than 5 persons and which is not a subsidiary company or a company in which the public are substantially interested. For the purpose of this subsection . . . A company shall be deemed to be a company in which the public are substantially interested if shares of the company . . . carrying not less than 25 per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the year or other period for which the accounts of the company have been made up as aforesaid beneficially held by the public (not including a company to which the provisions of this section apply) and any such shares have in the course of such year or other period being the subject of dealings on a stock exchange in the United Kingdom and the shares have been quoted in the official list of such a stock exchange . . .

The Special Commissioners held that the shares of the company had, in the course of the years in question, been the subject of dealings on a stock exchange in the United Kingdom, and that is not disputed by the Crown. They also held that the shares had been quoted in the official list of such stock exchange. That is disputed by the Crown, and is raised as a point in the Crown's favour, although not by cross-appeal.

Counsel for the appellant company pointed out that it was not necessary that the shares should have been quoted in the official list of such stock exchange for the year or years in question, and that in fact they had been quoted during 1914 and 1915 among the official quotations in the daily list of the Cardiff Stock Exchange. The Crown first of all assume that they have to be mentioned among the official quotations of securities in the year in question. They then contend that it is not sufficient if the shares have been mentioned in the list of the stock exchange if they were mentioned in the list of other business done, because the daily list of both the Cardiff Stock Exchange and the London Stock Exchange contains a list of official quotations and also a list of other business done, but both are contained in the one main list, and both the witnesses who gave evidence before the Special Commissioners said that, in their opinion, the whole list was one official list, and that the other business done was equally a part of the official list of the stock exchange. In my opinion, the commissioners were right, and, in any event, would have been right, on the ground that it was not necessary for the shares to have been in the official list during the year in question, so that, even upon the Crown's construction of the official list, these shares had been quoted in the official list of the stock exchange. So much for the Crown's contention that the commissioners were wrong on that point.

Upon the other and more important point, it is contended for the Crown that Mrs. Blyth was not a member of the public, because she was the niece of Lord Glanely, and because, apparently, the shares were given to her, and were not purchased by her. That is to say, 16,000 of them were given to her, and were not purchased by her. No suggestion is made that she acquired them conditionally. That suggestion has been expressly disclaimed by the Attorney-General. It is said, however, that, because she is Lord Glanely's niece, and because she got the shares by way of a gift, she is not a member of the public. It is also said that the public are not contrasted in that section with the 5 persons under whose control *ex hypothesi* the company is. It is argued that, since the 5 persons may control the company by holding 51 per cent. of the shares, and since the section refers to only a 25 per cent. holding on the part of the public, the contrast cannot be between the 5 persons and the public, because that leaves 24 per cent, of the shares, so to speak, in the air. It seems to me that the view of the legislature may have been that the company would not be controlled by a mere 51 per cent. holding, but would be controlled only by a 75 per cent. holding, in which case the point would have no substance in it, but, in any event, it is not a point which induces me to hold that the word " public " must be read in any different sense from the ordinary meaning of the word. Some light is thrown upon the meaning of the word, first, by the section itself, which in a paraphrase says that it is not to include a company to which the provisions of the section apply, and, secondly, by the definition in the original Act of 1922 of a company which is deemed to be under the control of 5 persons, where, by sect. 21 (6) of the Act of 1922, it provides as follows :

> . . . A company shall be deemed to be under the control of any persons where the majority of the voting power or shares is in the hands of those persons or relatives or nominees of those persons, or where the control is by any other means whatever in the hands of those persons ; The expression " relative " means a husband or wife, ancestor, or lineal descendant, brother, or sister . . .

That section has been amended by sect. 19 (1) of the Act of 1936 in more general terms, but in subsect. (2) it is provided that persons who are relatives of one another, or persons who are nominees of any other persons, shall respectively be treated as a single person, and the subsection contains the same definition of the word "relative." As the definition of the expression " relative " does not include a niece, these provisions indicate, in my opinion, that a niece is not deemed to be one of the 5 persons who control the company merely because she is a niece, nor is there any indication that the question of gift or consideration enters into the matter at all. The sole matter of importance is that the public should be substantially interested by a holding by members of the public which is either allotted unconditionally to them or acquired unconditionally by them, and, in my opinion, Mrs. Blyth was a member of the public, and it has never been suggested that the shares were acquired by her upon any condition whatever.

The Special Commissioners expressed their judgment in these words :

> In our opinion, it cannot be said that these 16,000 shares were allotted to, or acquired by, the public. They were not purchased in the market or acquired in any way for valuable consideration.

Pausing there, I have already pointed out that there is no mention in the section of the question whether the shares are purchased in the market or acquired for valuable consideration.

The commissioners continued as follows :

> They were a personal gift from Lord Glanely, who controlled the company, out of his own private holding of shares, to his niece as an accretion to her marriage settlement funds. Lord Glanely was one of the trustees of this settlement.

The only materiality of those observations appears to me to be as suggesting that the holding of Mrs. Blyth was not an unconditional holding, and that was not found as a fact. As I say, it was never suggested. Upon these facts, the commissioners found " that this transaction was not an acquisition by or allotment to the public," and they appear to me to have omitted to consider the words which are crucial in the matter—namely, " allotted unconditionally to or acquired unconditionally by." In my opinion, Mrs. Blyth was a member of the public, and she did acquire these shares unconditionally. The public were, therefore, substantially interested in the appellant company, and the appeal will be allowed with costs.

Appeal allowed with costs.

Solicitors : *William A. Crump & Son*, agents for *Gilbert Robertson & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

R. *v.* HESTON AND ISLEWORTH RATING AREA AUTHORITY AND SOUTH MIDDLESEX ASSESSMENT COMMITTEE, *Ex parte* CONTI.

[King's Bench Division (Hawke, Charles and Singleton, JJ.), **September 23, 24, October 11, 1940, April 29, 1941.**]

Rates—Valuation list—Amendment—Proposal—Delegation of powers to finance committee—Ratification of proposal—Rating and Valuation Act, 1925 (*c.* 90), *s.* 37 (1).

By reason of a decision of the House of Lords, a new element was introduced into the valuation of licensed premises. The Middlesex County Valuer reported that, in the circumstances existing in that county, a *prima facie* case existed for the increase of the assessments of all licensed premises in that county. The county valuation committee thereupon asked rating authorities to make proposals for the amendment of the valuation list in respect of such premises. The borough of Heston and Isleworth had delegated to its finance committee the preparation of the valuation list and it was to consider and report when necessary on all matters arising under the Rating and Valuation Acts. On Mar. 21, 1939, the finance committee, having considered the valuation of certain licensed premises, determined that proposals for amendment should be made by the Town Clerk. He duly signed such proposals on Mar. 23, 1939 in which the rating authority asked for amendment of the list by increasing the gross and rateable values so as to accord with the judgment of the House of Lords, the then values being insufficient, incorrect and unfair. On Mar. 28, 1939, the council approved and confirmed the action of the committee and the proposal made and signed by the Town Clerk. On Apr. 15, 1939, notice of objection to the proposal for amendment was given. It was contended that the proposal was not made by the rating authority as required by the Rating and Valuation Act, 1925, s. 37, and that it could not be ratified by the authority after the proposal had been made ; that the rating authority was not an aggrieved party ; and that the proposal was bad because a definite increased value was not inserted in it :—

Held (i) (Hawke, J., *dissenting*) : the proposal was a proposal of the rating authority, and, if this were not so, since it was ratified and adopted by them before any objection was taken to it, it must thereafter be regarded as the proposal of the rating authority.

(ii) the rating authority was an aggrieved party

(iii) the proposal was sufficient although it did not give a definite figure to which the rateable value of the premises should be increased.

[**EDITORIAL NOTE.** The argument which the majority of the court have rejected here is that a proposal for the amendment of the valuation list is required by law to be made by the rating authority, and, as this is a statutory requirement, they cannot delegate it to another body. It was agreed that the question here raised was purely a technical one, since, in the circumstances of this case, the proposal was upon the merits a perfectly proper one. In practice the rating authority must almost necessarily leave all such matters to its finance committee and, in general, confine itself to the adoption of its suggestions. This procedure, it would seem, could not be attacked where the proceedings and suggestions of the committee are adopted before any proposal is made and signed on behalf of the authority. In the present case the proposal was signed before that adoption, and that is the chief difficulty in the matter.

As to Proposal for Amendment, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484-488, para. 913 ; and for Cases, see DIGEST, Supp., Rates and Rating, Nos. 1146a-1170a.]

Cases referred to:

(1) *St. Leonard Vestry* v. *Holmes* (1885), 50 J.P. 132; 41 Digest 41, *299*.

(2) *Firth* v. *Staines*, [1897] 2 Q.B. 70; 41 Digest 41, *300*; 66 L.J.Q.B. 510; 76 L.T. 496.

(3) *R.* v. *Chapman, Ex p. Arlidge*, [1918] 2 K.B. 298; 36 Digest 233, *729*; 87 L.J.K.B. 1142; 119 L.T. 59.

(4) *Bowyer, Philpott & Payne, Ltd.* v. *Mather*, [1919] 1 K.B. 419; 38 Digest 169, *131*; 88 L.J.K.B. 377; 120 L.T. 346.

(5) *Robinson Bros. (Brewers), Ltd.* v. *Durham County Assessment Committee (Area No. 7)*, [1938] A.C. 321; Digest Supp.; 158 L.T. 498; *sub nom. Robinson Bros. (Brewers), Ltd.* v. *Houghton and Chester-le-Street Assessment Committee*, [1938] 2 All E.R. 79; 107 L.J.K.B. 369.

(6) *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630; 38 Digest 567, *1052*; 67 L.J.Q.B. 643; 78 L.T. 758.

(7) *R.* v. *Thanet and District Assessment Area Assessment Committee and Kent County Valuation Committee, Ex. p. Isle of Thanet Gas Light and Coke Co.*, [1939] 2 K.B. 640; [1939] 2 All E.R. 489; Digest Supp.; 108 L.J.K.B. 515; 160 L.T. 509.

(8) *R.* v. *West Norfolk Assessment Committee, Ex p. Ward* (1930), 94 J.P. 201; Digest Supp.

(9) *Lilley & Skinner, Ltd.* v. *Essex County Valuation Committee* (1935), 153 L.T. 64; Digest Supp.

(10) *Brooks, Jenkins & Co.* v. *Torquay Corpn.*, [1902] 1 K.B. 601; 13 Digest 390, *1165*; 71 L.J.K.B. 109; 85 L.T. 785.

MOTION for an order of prohibition to the South Middlesex Assessment Committee to prohibit them from hearing a proposal for the amendment of the valuation list. The facts are fully set out in the judgment of SINGLETON, J.

A. S. Comyns Carr, K.C., and *Frederick Grant* for the applicant.

W. Craig Henderson, K.C., and *Harold B. Williams* for the respondents.

HAWKE, J.: I have read the judgment which SINGLETON, J., is about to deliver, and I have discussed it with him and CHARLES, J. Unfortunately, I am not in agreement with them as to what the result of this case should be. I regret it, because my view involves the acceptance of pure technicalities and is one which, apart from such technicalities, must admittedly be without any merits. As, however, I have formed a view, I must express it.

The judgment of SINGLETON, J., sets out substantially the facts of the matter, and there is no need for me to repeat them, save in so far as it is necessary to illustrate my difficulties. Admittedly, the rating authority could delegate to their finance committee their powers with regard to rating. To a very large extent they did so, but I do not think that they included in the powers delegated the right to decide without reference to the council whether proposals should be made for the revaluation of hereditaments within their area. The committee, in the circumstances stated by SINGLETON, J., on Mar. 21, 1939, made such a proposal to the applicant and served it upon him on Mar. 23, 1939. They referred this to the council, who on Mar. 28 approved the action of the committee, but this was after the proposal had been made to the applicant. It is upon this ground, amongst others, that the application is now made for the writ of prohibition to prohibit action upon the proposal in question.

It is said on behalf of the applicant that there was no effective proposal and that, as the proposal was not made by the only persons who, in the circumstances, had jurisdiction to make it—namely, the council—a subsequent approval by the council could not cure the defect. On this point, counsel for the applicant cited *St. Leonard Vestry* v. *Holmes* (1), *Firth* v. *Staines* (2), *R.* v. *Chapman, Ex p. Arlidge* (3) (which two latter cases he distinguished on the facts) and *Bowyer, Philpott & Payne, Ltd.* v. *Mather* (4). He submitted that, as the power to make proposals for revaluation was a statutory matter, it could be exercised only within the terms of the statute, that the statute required that the council should exercise its discretion as to the proposal (unless it delegated the power to some other body, which I assume it did not in this case) and that it must do so before the proposal is made, and not by subsequent approval of what some other body has done. Upon the sum of these decisions, I am driven to the conclusion that counsel for the applicant is right, that no proposal within the terms of the statute was made, and that *prima facie* the writ of prohibition should be granted. Perhaps it is a little difficult to see why the observations of Wright, J., in *Firth* v. *Staines* (2), at p. 75, should not cover the matter, especially as it would not be right to assume that the principal would not exercise his discretion on the matter when deciding whether or not to ratify. I think that the cases cited, as a whole, decide otherwise: see particularly *Bowyer, Philpott & Payne, Ltd.* v. *Mather* (4) and Avory, J., in *R.* v. *Chapman, Ex p. Arlidge* (3), at p. 308.

It was said on behalf of the council, however, that the issue of the writ was discretionary, and that, having regard to the lapse of time which had taken place, it ought not to issue. I feel a great deal of doubt on this point, but, inasmuch as the delay involved was, for the greater part, due to the desire of both parties to arrive at a settlement and thus avoid litigation, I am not prepared to say that the delay is in this case sufficient ground for refusing the issue of the writ.

On the other points of counsel for the applicant, I am entirely in agreement with Charles and Singleton, JJ. It does not seem necessary to repeat their views.

Charles, J.: I have read and discussed the judgment which is about to be delivered by Singleton, J. Inasmuch as it was admitted by counsel for the applicant that this was a matter entirely without merits, I do not propose myself to deliver any judgment of my own. I adopt the judgment of Singleton, J.

Singleton, J.: As from the decision of the House of Lords in *Robinson Bros. (Brewers), Ltd.* v. *Durham County Assessment Committee (Area No. 7)* (5), which decision was given on Mar. 17, 1938, a new element was introduced into the valuation of licensed premises. The Berkeley Arms, Bath Road, Hounslow, was owned by Messrs. Benskins (Watford) Brewery, Ltd., but, until the decision already mentioned, it was not open to the rating authority in valuing the hereditament, or to the assessment committee in coming to a decision as to the value, to have regard to the rent which brewers as such might be prepared to pay as rent for the premises, and the value had to be determined as the amount which a hypothetical tenant would pay, disregarding the rent which brewers as possible hypothetical tenants would be prepared to pay. The decision in *Bradford-on-Avon Assessment Committee* v. *White* (6), which had stood for many years, was overruled. It can surely be said that everyone conversant with such matters realised that the introduction of this element would mean, in a normal case, an increase in the value of licensed premises. The matter is dealt with in para. 5 of the affidavit of Harfield, the county valuer for Middlesex, in this way:

> At this meeting (Jan. 19, 1939) the unanimous opinion of the valuers including myself was that there was a *prima facie* case for an increase in the assessment of every on-licensed house in the county. It was pointed out, as is the fact, that out of a total of 1,088 on-licensed premises in the county only 27 were not already owned by brewers and that in the greater part of the county there had been abnormal development in recent years with a consequent increase in population which in turn led to an increase in the brewers' demand for houses. It was our opinion that brewers would compete for every licensed house in the county and that *prima facie* they might reasonably be expected to pay higher rents than were represented by existing assessments.

In view of that, and in view of the fact that the Berkeley Arms was well-known to those who suggested the making of the proposal and to those who made it, the argument of counsel for the applicant that the rating authority cannot be said to be a "person aggrieved" fails. The facts generally were known, and I do not see any necessity for a new valuation to be made before it can be said that either rating authority or ratepayer is aggrieved, especially in a case in which the trade figures could not be obtained, according to the evidence. It is then submitted that the proposal is bad because it does not state the figures proposed to be inserted in place of the old figures of £700 gross and £580 rateable value. A considerable time was occupied by counsel for the applicant on this point, on which this court had expressed its view in *R.* v. *Thanet and District Assessment Area Assessment Committee and Kent County Valuation Committee, Ex p. Isle of Thanet Gas Light and Coke Co.* (7) following the words of SCRUTTON and GREER, L.JJ., in *R.* v. *West Norfolk Assessment Committee, Ex p. Ward* (8). I refer to two passages in the *Thanet Assessment Committee* case (7), the first being that in the judgment of LORD HEWART, L.C.J., at pp. 646, 647 ([1939] 2 All E.R., at p. 494):

> Our attention has been directed to *R.* v. *West Norfolk Assessment Committee, Ex p. Ward* (8). I need not reiterate the facts of that case, but I observe that SCRUTTON, L.J., in his judgment used these words [p. 202]: "One point in this case may arise as to whether a proposal for amendment which does not state what amendment is proposed, is a good proposal"; and GREER, L.J., in his judgment said: "It seems to me to be sufficient if his proposal says that he desires to have

the list amended and states the way in which he desires to have it amended, namely, by the reduction of the total assessment without stating the amount of the reduction which he is going to ask the assessment committee to approve." But can it fairly be said here that this so-called proposal does state what amendment is proposed ? I agree that it matters not whether that which is proposed translates itself into terms of reduction or into terms of increase, but who can say what it is that is proposed here ? The matter seems to me to be left altogether too vague.

The other passage is in my own judgment in that case at p. 649 [1939] 2 All E.R., at p. 496) :

> The proposal does not show what amendment it is proposed to make. In *R.* v. *West Norfolk Assessment Committee, Ex p. Ward* (8) it was decided in the Court of Appeal that it was not necessary in a proposal for the proposer to state the precise figure to which he desired that the valuation should be reduced. It is clear from the judgments of SCRUTTON and GREER, L.JJ., to which Lord HEWART, L.C.J., has referred, that at least the nature of the amendment must be indicated.

I should add that AVORY, J., had expressed the same view in *Lilley & Skinner, Ltd.* v. *Essex County Valuation Committee* (9). The proposal in the present case was :

> . . . for amendment of the said list by increasing the gross and rateable values of the hereditament . . . so as to accord with the judgment of the House of Lords in *Robinson Bros. (Brewers), Ltd.* v. *Durham County Assessment Committee (Area No. 7)* (5), the present values being insufficient, incorrect and unfair.

I see no reason for departing from the views already expressed. Indeed, I consider that the matter is concluded, so far as this court is concerned. Counsel for the applicant submitted that, in the cases referred to, the observations in the various judgments of the Lords Justices on the point were *obiter dicta.* If they were—and I do not think that it ought to be so considered—this court would adopt their view as applicable to this case. This proposal is in form sufficient to comply with that which the Rating and Valuation Act, 1925, requires. Sect. 37 (2) of that Act provides as follows :

> Every proposal made under this section must (*a*) be made in writing and, except where it is made by the rating authority, be served on the rating authority ; (*b*) specify the grounds on which the proposed amendment is supported.

A more difficult point arises on the objection taken on behalf of the applicant that the proposal bearing date Mar. 23, 1939, was not made by the rating authority. Sect. 1 (1) of the Act of 1925 provides as follows :

> The council of every county borough and the council of every urban and rural district shall be the rating authority for the borough or for the county district, and from and after the appointed day no authority or person other than the council shall have power to make or levy any rate within the borough or district.

The rating authority in this case was the borough of Heston and Isleworth. Objection is taken that the proposal was not made by the rating authority, but by the finance committee of the rating authority, and that, consequently, there is no jurisdiction in the assessment committee to hear and determine the question. In the statement delivered by the applicant at the time when the application was made, the ground is stated in this way. Ground (*a*) is as follows :

> That the said proposal is invalid and inoperative in law because it was not made by the said council but was made by the finance committee of the said council and the said committee had no power delegated to it by the said council or otherwise to make the said proposal.

The proposal is signed by the town clerk, and purports to have been given on behalf of the rating authority. Rating matters were normally dealt with by the finance committee, but the delegation to them by the council is in somewhat limited terms :

> To prepare the borough valuation list and to consider and report when necessary on all matters arising under the Rating and Valuation Acts, or any Act or Acts amending or affecting the same.

It is pointed out that the making of a proposal for revision or amendment of a current valuation list under the powers given by sect. 37 is a different thing from preparing the valuation list under sects. 25-30, and it is said further that, in making such a proposal, the finance committee were going beyond their powers.

The facts are these. The Middlesex County Valuation Committee (whose duty it was under the Rating and Valuation Act, 1925, s. 18 (2), to promote uniformity in valuations) considered the position arising out of the decision of the House of Lords, and, as a result, asked the rating authorities to make proposals before Mar. 31, 1939, in respect of all on-licensed premises, and they resolved that, in the event of any authorities not being willing to do so, such proposals be lodged by the county valuation committee. This was passed on to the rating authority by letter of Feb. 13, 1939, and, in accordance with the usual practice, the town clerk brought it before the finance committee, who considered it on Feb. 21, 1939, and again on Mar. 21, 1939. On the latter date, they determined that proposals for the amendment of the valuation list in respect of the 83 on-licensed premises within the borough be made and signed by the town clerk in accordance with the Rating and Valuation Act, 1925, s. 37. Accordingly, the town clerk, purporting to act on behalf of the rating authority, made the proposal of Mar. 23, 1939. On Mar. 28, the matter came before the council, and it was resolved as follows :

> That the action of the finance committee, in giving instructions for a proposal to be made and signed by the town clerk in accordance with the Rating and Valuation Act, 1925, s. 37, in respect of each hereditament included in the schedule submitted by the borough treasurer to the committee at their meeting on Mar. 21, 1939 . . . be approved and confirmed.

Shortly before Apr. 15, the applicant gave notice of his objection to the proposal. This was followed by a notice from the borough treasurer that the objection would be heard by the assessment committee on May 10, 1939, and by a notice from the county valuer that the county valuation committee intended to appear and to oppose the objection, or, in other words, to support the proposal. From that time onwards, many months were spent in discussions with the occupiers, or more often with the owners, in endeavouring to arrive at agreement on the value of on-licensed houses within the county after the introduction of the new element. Agreement was reached in 932 cases out of 1,088, and in all except 50 cases there was an increase in the valuation, the 50 cases remaining as they were before. It may be taken as fairly certain that there would be an increase in the assessment of the Berkeley Arms. At least, it looks so from the affidavit of Harfield, the county valuer. It then occurred to Milne, a valuer acting for the applicant or for the brewer owners of the Berkeley Arms, to go into the matter from another angle, and on May 15, 1940, and again in June (his affidavit says 1939, but it was 1940) he inspected the minutes and records of the rating authority and discovered that the proposal had been made before the date of the resolution of the council approving the minutes of the finance committee. Hence the submission that the proposal is bad, because it is said that it was not made by the council, the rating authority. It is admitted that the contention is highly technical, and that it has no merits. It is right to say that the delegation to the finance committee does not strictly embrace the making of proposals for amendment of the current valuation lists. These are matters which they may consider and on which they may report, and they did so. Before their report was approved and confirmed, they had caused a proposal to be made. At the same time, the proposal purported to be made on behalf of the rating authority, and within a few days—namely, on Mar. 28—the rating authority passed a resolution in these terms:

> That the action of the finance committee, in giving instructions for a proposal to be made and signed by the town clerk, in accordance with the Rating and Valuation Act, 1925, s. 37, in respect of each hereditament included in the schedule submitted by the borough treasurer to the committee at their meeting on Mar. 21, 1939, and for a copy of such schedule to be transmitted to the South Middlesex Assessment Committee be approved and confirmed.

It is clear that the rating authority adopted the proposal as their proposal on Mar. 28, and that they could not thereafter be heard to say that it was not theirs, even if they could have done so beforehand, which is doubtful, having regard to the fact that it was given by the town clerk in their name.

Authorities were cited to us by counsel on each side on the subject of ratification. Those authorities appear to me to be conflicting, and I do not gain any great help from them. They refer to matters in no sense akin to the question before this court. The Rating and Valuation Act, 1925, prescribes a means of bringing before the assessment committee the party who says that an assessment ought to be altered and the party who objects to that proposal. The procedure is laid down by the statute, and must be followed. At the same time, one is not dealing with an information, or with anything of a penal nature. The proposal was made by the town clerk in the name of the rating authority. It was adopted by the rating authority on Mar. 28, before the expiration of the then current year for rating purposes, and before the ratepayer gave notice of objection. The town clerk was the person who normally would give a notice or make a proposal on behalf of the rating authority. He did so, and, in so far as the applicant is concerned, I do not see that it is necessary that there should be a resolution of the council (the rating authority) authorising him to do that. He did it after the decision of the finance committee, and in the belief that the rating authority would approve, and they did so when the matter came before them. In the case of certain contracts, an urban authority can bind itself only if the contract is under seal: Public Health Act, 1875, s. 174. I find that, in *Brooks,* A *Jenkins & Co.* v. *Torquay Corpn.* (10), it was held by WALTON, J., that an urban authority could at a later date confirm a contract not under seal and so make itself responsible for debts or on contracts before there had been any contract under seal. I do not regard that as in any sense covering the present case, but it may be said that the local authority, by B its confirmation or adoption of what had gone before, was covering the oversight of its officer, its clerk, in so far as it was necessary to do so. WALTON, J., said, at p. 607:

> But, apart altogether from this, I think that the confirmation by the council under their seal of the original retainers created an obligation binding upon the council without any new consideration.

C

In all the circumstances, I am of opinion that the submission of counsel for the applicant fails, and that we ought to hold that the proposal was the proposal of the rating authority. Quite clearly, they adopted it as theirs as from Mar. 28. Such a decision is at least in accord with common D sense, for in practice the conduct of such matters is left by the rating authority to the finance committee. Moreover, the rating authority approved the action of the town clerk, and it is to be remembered that the proposal was brought about by the county valuation committee, who themselves would have made a proposal if the rating authority had shown E any reluctance to do so, and who in fact gave notice of intention to appear after the ratepayer gave notice of objection to the proposal. It would indeed be unfortunate if we were compelled to hold otherwise, for it would mean that, while other ratepayers had had their assessments increased, it would not be open to the assessment committee to consider the assessment F of the Berkeley Arms, and for two years they would escape any increase in assessment, so that the efforts of the county valuation committee to promote uniformity would be defeated.

I would add a word or two about the relief sought. It is argued by the respondents that the grant of a writ of prohibition is discretionary, and G that we ought not to grant it, in the circumstances of the present case. I quite agree that we ought not to do so if we have a discretion, but, if it be right to say that the proposal is bad, and that consequently the assessment committee has no jurisdiction to hear and determine the matter, I do not think that we have any such discretion. The point H could, by amendment of the notice of objection, perhaps, have been taken before the assessment committee, and, if the proposal was held to be bad, then the assessment committee would have been bound to hold that they had no jurisdiction, and, though there is nothing to show that the assessment committee intended to usurp jurisdiction, it seems to me that, in the interests of avoiding multiplicity of proceedings, we ought to grant the relief asked for if we considered the proposal as bad. None the less, it would appear to be a strange result if we were bound to prohibit the assessment committee from going into the matter, and thus to prevent them from doing justice between the parties. As I have already said, I hold the opinion that this application fails, and that the proposal should be treated for all purposes as the proposal of the rating authority. A

Application refused with costs.

Solicitors: *Crossman, Block & Co.* (for the applicant); *H. Swann*, Town Clerk, Heston and Isleworth Borough Council (for the respondents). B

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

Re WARD, PUBLIC TRUSTEE *v.* BERRY.

[COURT OF APPEAL (MacKinnon, Clauson and Luxmoore, L.JJ.), **April 23, May 2, 1941.**]

Charities—Religious purposes—Absolute discretion of trustee—" Educational or charitable or religious purposes for Roman Catholics in the British Empire."

A testator by his will gave the residue of his property " to the Archbishop of Westminster or other head of the Roman Catholic Church in England for the time being upon trust that he shall forthwith in his absolute discretion devote the same to the furtherance of educational or charitable or religious purposes for Roman Catholics in the British Empire in such manner in all respects as he may think fit." It was contended that this was not a good charitable gift and was void for uncertainty :—

HELD : the words used by the testator constituted a good charitable trust, and, accordingly, the gift to the Archbishop was a valid charitable bequest.

Decision of Farwell, J. ([1941] 1 All E.R. 315) *reversed on this point.*

[**EDITORIAL NOTE.** It will be remembered that in *Re Diplock, Wintle* v. *Diplock* (14) it was held that a gift for charitable or benevolent purposes is void. It is here, in effect, held that a gift for charitable or religious purposes is a valid gift. The distinction between the two cases appears to be that the authorities oblige the court to hold that benevolent purposes are *prima facie* not charitable in the legal sense whereas religious purposes are *prima facie* charitable in that sense. It must, of course, always be understood that there are dangers in thus seeking to extract a principle from a construction case, since the decision in every such case is based upon the whole document before the court, and, in the case of a will, is intended to give effect to the intention of the testator as shown by a consideration of the will as a whole. It is possibly too late now to attempt in every case to return to that first principle of construction, as MACKINNON, L.J., has succeeded in doing here. The Court of Appeal found it impossible in *Re Diplock, Wintle* v. *Diplock* (14), and were forced to a decision which was obviously contrary to the intention of the testator ; but it is well to remember that SIR GEORGE JESSEL, M.R., said that the only result of referring to authorities for the purpose of construing a document was confusion and error. The proper course is to find the intention of the parties from the plain meaning of the words used and only to be led away from that when the authorities force one to do so. It is for this reason that a warm welcome should be extended to a judgment such as that of MACKINNON, L.J., herein, which, ignoring the fine distinctions made in the authorities, makes a bold return to first principles.

AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122. paras. 155-160 ; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

Cases referred to :

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531 ; 28 Digest 10, *51* ; 61 L.J.Q.B. 265 ; 65 L.T. 621 ; 3 Tax Cas. 53 ; *affg.* S.C. *sub nom. R.* v. *Income Tax Comrs.* (1888), 22 Q.B.D. 296.

(2) *Re White, White* v. *White*, [1893] 2 Ch. 41 ; 8 Digest 249, *89* ; 62 L.J.Ch. 342 ; 68 L.T. 187.

(3) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574 ; 8 Digest 245, *48* ; 40 L.J.Ch. 640 ; 24 L.T. 869.

(4) *Dunne* v. *Byrne*, [1912] A.C. 407 ; 8 Digest 294, *718* ; 81 L.J.P.C. 202 ; 106 L.T. 394.

because it is the only one which laid down a principle which I can follow. That is the passage in the opinion of Lord Macnaghten in *Income Tax Special Purposes Comrs.* v. *Pemsel* (1), which was quoted by Farwell, J. Lord Macnaghten said, at p. 583 :

> " Charity " in its legal sense comprises four principal divisions : trusts for the relief of poverty ; trusts for the advancement of education ; trusts for the advancement of religion ; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

The words in this will are :

> . . . upon trust that he shall forthwith in his absolute discretion devote the same to the furtherance of educational or charitable or religious purposes . . .

Using such knowledge of the English language as I possess, I think that these words have precisely the same meaning as the first three of the categories in the definition of Lord Macnaghten. The only difference seems to be (i) that the word " furtherance " is used instead of the word " advancement," and (ii) that, while the order of categories adopted by Lord Macnaghten is " relief of poverty," " education," and " religion," the testator's order is " education," " charity " and " religion." To my mind, this makes no difference, and I think that the testator's words exactly fulfil the definition of Lord Macnaghten of a charitable trust. To put it in another way, if the testator's words were " on trust for the furtherance of charitable, or educational, or religious purposes," the identity with the definition of Lord Macnaghten would be complete, save for the immaterial substitution of the word " furtherance " for the word " advancement." Equally would the gift appear to be, under that definition, a good charitable gift if the words were " on trust for the furtherance of educational or religious or charitable purposes." If these simple words, arranged in either of these collocations, would create a good charitable gift, I am quite unable to understand why they fail to do so when the three disjoined purposes happen to be arranged in the order " for the furtherance of educational or charitable or religious purposes." In the result, I think that the answer to the question propounded ought to be that the residuary gift to the Archbishop is a valid charitable bequest, and this appeal ought accordingly to be allowed.

Clauson, L.J. : I agree that the disposition of the residuary estate is valid, and that in this respect the appeal against the order of Farwell, J., must be allowed. The view of Farwell, J., that the gift is uncertain in that no one can enforce it depends upon the proposition that, according to the true meaning of the will, the Archbishop is empowered to apply the fund bequeathed to him, not only for educational purposes and for charitable purposes, but also (under the words " for religious purposes ") for purposes which do not fall within the ambit of charitable purposes as that phrase is used in this court. In my judgment, that is not the true effect of the phrase " religious purposes " as used in this will. In my judgment, it must be taken to be settled law—at all events in this court, since the delivery of the judgment in *Re White, White* v. *White* (2)—

that, in the absence of a context enabling the court to place some more extended meaning on the words "religious purposes," the phrase must be taken to mean "purposes conducive to the advancement of religion," and, accordingly, purposes which, as stated by LORD MACNAGHTEN in
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C a special sense, so as to cover a purpose which, though connected with religion, is not a purpose conducive to the advancement of religion. The judge appears to find an indication of the use of the phrase in that extended sense in the words "for Roman Catholics in the British Empire." I fear that I cannot agree that these words supply the necessary context.
D They seem to me to indicate merely that the beneficiaries of the particular charitable purposes (including educational and religious and other charitable purposes) for the advancement of which the fund is to be applicable are to be members of the Roman Catholic community. He further finds support for his view in the collocation of the phrase
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H these courts. Should any attempt be made, in administering the gift, to exceed such limits, the Attorney-General will be entitled to interfere. Accordingly the gift must, in my judgment, be held to be valid.

LUXMOORE, L.J.: By his will, dated Nov. 19, 1939, Charles Holwell Ward directed his trustees to stand possessed of the residue of his estate:

> . . . in trust to pay and transfer the same to the Archbishop of Westminster or

because it is the only one which laid down a principle which I can follow. That is the passage in the opinion of LORD MACNAGHTEN in *Income Tax Special Purposes Comrs.* v. *Pemsel* (1), which was quoted by FARWELL, J. LORD MACNAGHTEN said, at p. 583 :

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Luxmoore, L.J.: By his will, dated Nov. 19, 1939, Charles Holwell Ward directed his trustees to stand possessed of the residue of his estate:

> . . . in trust to pay and transfer the same to the Archbishop of Westminster or

> other the head of the Roman Catholic Church in England for the time being upon trust that he shall forthwith in his absolute discretion devote the same to the furtherance of educational or charitable or religious purposes for Roman Catholics in the British Empire in such manner in all respects as he may think fit.

Ward died on May 27, 1940, and his will was proved by the Public Trustee in the Exeter District Probate Registry on July 12, 1940. A number of questions arose with regard to the construction of his will and the administration of his estate. On Nov. 6, 1940, the Public Trustee issued an originating summons for the determination of those questions, one of which is whether the residuary gift to which I have already referred is a valid charitable bequest.

The originating summons came before FARWELL, J., who made an order declaring that the residuary gift was invalid and that there was an intestacy as regards the residuary estate. The present Roman Catholic Archbishop of Westminster has appealed from these declarations, and asks this court to declare that the residuary gift is a valid and effective charitable bequest in his favour, to be held by him upon the trusts declared by the will with regard thereto. The ground upon which the judge held the residuary gift to be invalid and the residue undisposed of was that the gift was void for uncertainty because the trust declared in respect of it was not strictly charitable within the legal meaning of that word. After he had stated that there was no general charitable intention in the will, the judge considered the three several purposes mentioned in the will—namely, educational purposes, charitable purposes and religious purposes—and pointed out that each heading must be considered separately, owing to the use of the disjunctive word "or." He held that the furtherance of educational purposes was the proper object of a valid charitable gift, although by the use of the disjunctive it was in a sense contrasted with what is charitable, and added, at pp. 318, 319 :

> However, when one comes to the words "religious purposes," the position becomes very much more difficult for those who are seeking to uphold this gift . . . in my judgment, the words "religious purposes" in themselves are wide enough to embrace purposes which are not charitable within the legal meaning of the word.

The question for this court is whether this is the correct method of construing the residuary gift. It is well-settled that "charity" in the legal sense has a far wider meaning than the word conveys in its popular use, for it is usual to refer to the preamble to the statute 43 Eliz., c. 4, as defining its meaning, but the word is by no means limited to the exact charities referred to there. LORD MACNAGHTEN said in *Pemsel's* case (1), at p. 583, that charity in its legal sense comprises four principal divisions—namely, trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. Since the decision in *Pemsel's* case (1), the division made by LORD MACNAGHTEN has been universally used in the textbooks to classify charities in the legal sense. Thus, in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 4, p. 103, charitable purposes, which are dealt with in sect. 2 of Part 1 of the title, are subdivided under the headings

(1) relief of the aged, impotent and poor, (2) educational purposes, (3) religious purposes, and (4) public purposes. Further, it has been frequently stated, both in textbooks and in reported cases, that gifts for religious purposes are *prima facie* valid charitable gifts. It is stated in TUDOR ON CHARITIES, 5th Edn., p. 31 :

> . . . the proposition that "religious purposes" are objects of charity would seem to be established by authority.

Later, it is said, at p. 66 :

> In England and Ireland religious purposes are *prima facie* charitable.

In *Dunne* v. *Byrne* (4), LORD MACNAGHTEN said, at p. 411 :

> . . . the court has held over and over again that a gift for religious purposes is a good charitable gift. That is true.

In *Farley* v. *Westminster Bank, Ltd.* (5), LORD ATKIN said, at p. 435 ([1939] 3 All E.R., at p. 492) :

> . . . "parish work" seems to me to be of such vague import as to go far beyond the ordinary meaning of charity . . . in the sense of being a religious purpose.

It is true that in a number of cases it has been said that the words "religious purposes" are wide enough to embrace purposes which are not charitable within the legal meaning of the word. It is perhaps sufficient to refer to the statement made by WICKENS, V.-C., in *Cocks* v. *Manners* (3), at p. 585 :

> It is said, in some of the cases that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public, an annuity to an individual so long as he spent his time in retirement and constant devotion would not be charitable nor would a gift to ten persons so long as they lived together in retirement and performed acts of devotion be charitable.

It is to be observed that in *Cocks* v. *Manners* (3) the court had not to consider what meaning should be attached to the words "religious purposes," for those words did not appear in the will under consideration. The material words are to be found in the gift to :

> . . . the following religious institutions namely . . . the Dominican convent at Carisbrook and the Sisters of Charity of St. Paul at Selley Oak.

The validity of each of these gifts was tested by the objects for which the respective institutions were established, and, in the result, the bequest to the Dominican convent was held not to be charitable in the legal sense of the term, while that to the Sisters of Charity of St. Paul at Selley Oak was held to be charitable. It is the fact that, in the majority of cases dealing with the question whether a gift for religious purposes constitutes a charitable gift, the actual words "religious purposes" are not present in the document under consideration. Indeed, so far as my own researches have proceeded, it seems that the actual words "religious purposes" occur in but a small number of the reported cases. In *Baker* v. *Sutton* (6), the material words of the residuary gift were "for such religious and charitable institutions and purposes" as the major part of his trustees should think proper. The gift was held to be a good charitable gift. In that case reference was made, both in the argument and in the judgment, to *Williams* v. *Kershaw* (7), where the gift was for such benevolent, religious and charitable purposes as the trustees should think most beneficial. Lord Cottenham said, at p. 113 :

> Did he [the testator] mean that there should be no application of any part of the residuary fund except to religious purposes ? Such does not appear to me to be his intention ; he intended to restrain the discretion of the trustees only within the limits of what was benevolent, or charitable, or religious.

There is also what purports to be an extract from the opinion of Lord Cottenham in *Williams* v. *Kershaw* (7) in a note in 1 Keen, at p. 232, where the following sentence is quoted :

> The option in the present case makes the gift bad not because illegal but because it introduces a generality which deprives it of the character of a charity legacy and makes it impossible for this court to execute it.

From these extracts, it is plain that, had the option been confined to religious purposes, Lord Cottenham would have held the gift valid. In *Wilkinson* v. *Lindgren* (8), the testatrix, after giving legacies to several charitable institutions, gave her residuary personal estate to and amongst the different institutions, or to any other religious institution or purposes as her trustees might think proper. Lord Hatherley, affirming the decision of Lord Romilly, M.R., held the gift to be a good charitable gift.

I have been unable to find any English case in which the words to be considered were " charitable or religious purposes," but these words were held in *Re Salter, Rea* v. *Crozier* (9) to constitute a valid charitable gift. There are, however, many reported cases where the court, in adjudicating on the validity of particular bequests, has held them to be valid because the words under consideration were construed as being equivalent to bequests for religious purposes. It is sufficient to refer to two of these cases. The first is *Re White, White* v. *White* (2). There the gift to be considered was in these terms :

> I do give and bequeath the whole of my property to the following religious societies, viz. . . .

There is then a blank in the will, followed by the words :

> . . . to be divided in equal shares among them.

The will was written on one side of several sheets of notepaper fastened together bookwise. On the back or blank sheet opposite the sheet on which the clause quoted was written were the following words, written by the testator after the execution of the will :

> . . . viz., the Tract Society, the Home Missionary Society, the London Missionary Society, the Colonial Missionary Society.

These words were not admitted to probate, and were consequently ignored. Lindley, L.J., said, at p. 52 :

> It is, however, impossible, we think, seriously to deny that the testator intended his property to be given to some religious societies for religious purposes. His property was to be divided amongst certain societies ; but what for ? The only rational answer to this question must, we think, be " for the purposes of those societies," and, the societies being themselves described as " religious societies," the purpose for which the testator gave his property must be treated as religious purposes. It is true that these are not necessarily " charitable " purposes, and in a particular case a " religious " society may be shown not to be a " charitable " society. This was the case in *Cocks* v. *Manners* (3). But the authorities show that

> a bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a "charitable" purpose, and that the law applicable to "charitable" bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution, or for a religious purpose.

Then he refers to *Baker* v. *Sutton* (6), *Townsend* v. *Carus* (10) and *Wilkinson* v. *Lindgren* (8), and continues as follows, at p. 53 :

> We can find no authority which really conflicts with these, or which is opposed to the principle on which they proceed ; and we cannot, without splitting straws, distinguish this case from them. We come, therefore, to the conclusion—first, that the gift is for religious purposes ; and, secondly, that, being for religious purposes, it must be treated as a gift for "charitable" purposes, unless the contrary can be shown.

In *Dunne* v. *Byrne* (4), the second case, the words of the gift were :

> I will and bequeath . . . that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese.

In dealing with the argument in support of the validity of the gift, LORD MACNAGHTEN made the statement to which I have already referred in the earlier part of the judgment, and went on to say, at p. 411 :

> But the answer is : This is not in terms a gift for religious purposes, nor are the words synonymous with that expression.

Referring to *Re White, White* v. *White* (2), he said, at p. 411 :

> All they [the Court of Appeal] did, was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift.

In view of these authorities, I am satisfied that this court is bound to hold that a gift for "religious purposes," if in those words, and if there is no other context, is a good charitable gift.

Is there any context in the will before the court in the present case which is sufficient to compel the court to hold that the words "religious purposes" are used in some restricted sense ? The only context from which any argument to support this view can possibly be drawn must be found in the use of the word "charitable" and of the disjunctive word "or" in the phrase in which the words "religious purposes" appear. FARWELL, J., accepted the argument that, because the word "charitable" by itself includes religious purposes, and because the words "or religious purposes" follow after the word "charitable," the latter words are redundant unless they are construed in the narrow sense as embracing only such religious purposes as are not, within the strict legal sense, charitable. It is to be observed that the main point of this argument applies with equal force to the meaning to be attributed to the word "educational" to be found in the earlier part of the gift, but the judge held that the word "educational" must be given its ordinary meaning. I can see no sufficient reason for adopting the restricted constructions. It is plain that both "educational purposes" and "religious purposes" are *prima facie* apt phrases for constituting valid charitable gifts. There are, however, many other objects which are strictly within the legal definition of "charity," and it seems to me that the word "charitable" may well have been used for the purpose of making it clear that those other objects were also to be included. In my judgment, the testator's use of the adjective "charitable" in addition to the adjectives "educational" and "religious" for defining his purposes cannot properly be relied on as showing that he intended to use the two last adjectives, or either of them, in some sense other than that primarily to be attributed to them or it. A There is no canon of construction which denies to a testator the privilege of indulging, to some extent, in tautology. For these reasons, and with all respect to the judge, I think that the appeal should be allowed, and that the declarations sought by the notice of appeal should be made. B

Appeal allowed.

Solicitors: *Witham & Co.* (for the appellant); *Treasury Solicitor* (for the Attorney-General); *Walter Crimp & Co.*, agents for *Harold Michelmore & Co.*, Newton Abbot (for all other parties). C

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

FRANKLIN *v.* MIDLAND BANK, LTD.

[CHANCERY DIVISION (Morton, J.), **April 29, May 2, 1941.**]

Emergency Legislation—Mortgage—Realisation of mortgage—Appointment of receiver—Proceedings against property charged—Collateral security without personal covenant—Leave to proceed—Courts (Emergency Powers) Act, A 1939 (*c.* 67), *s.* 1 (4).

A surety mortgaged certain property to secure the debt of the principal debtor, but entered into no personal covenant to pay any sum of money. The mortgage did, however, include the common form clauses (i) that as between the surety and the creditor the premises should be charged primarily B and as for money primarily due from the surety to the creditor; (ii) that the surety as against the creditor should not be entitled to prove in the bankruptcy of the principal debtor until all principal and interest due under the mortgage should have been paid. It was contended that the creditor required the leave of the court before he could appoint a receiver :—

C HELD : (i) upon the construction of the mortgage as a whole, the surety was under no personal liability to pay the debt of the principal debtor.

(ii) in order that relief may be given under the Courts (Emergency Powers) Act, 1939, s. 1 (4), it is necessary that there shall be a personal obligation to pay the money due and, as the mortgagor was under no such obligation, he was not entitled to relief. The fact that the principal debtor D was unable, by reason of circumstances directly or indirectly attributable to the war, to pay could not be considered in granting relief to the surety.

(iii) the mortgagee required the leave of the court to realise the security under sect. 1 (2), and, in the circumstances of this case, leave ought to be granted for the appointment of the receiver.

E [**EDITORIAL NOTE.** The judgment here, like that of FARWELL, J., in *Re National Provincial Bank, Ltd.* (1), applies only to the case of a collateral mortgage containing no covenant to pay. The case is one of considerable importance in that, while the judge agrees with FARWELL, J., that the mortgagor cannot be granted relief under the Courts (Emergency Powers) Act, 1939, s. 1 (4) he goes on to hold that the mortgagee does require leave to proceed under sect. 1 (2), a matter to which the attention of FARWELL, J., was not directed. The questions arising upon the F construction of the mortgage, although they may appear to some to be beyond dispute, are matters upon which it is very convenient to have judicial authority.

FOR THE COURTS (EMERGENCY POWERS) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 946.

Case referred to :

G (1) *Re National Provincial Bank, Ltd.*, [1941] 1 All E.R. 97 ; Digest Supp.

MOTION asking that an order of the master, dated Mar. 27, 1941, be reversed. The facts are fully set out in the judgment.

H *I. J. Lindner* for the applicant, the mortgagor.

A. Guest Mathews for the respondents, the bank.

MORTON, J. : On Jan. 17, 1941, the Midland Bank, Ltd., issued an originating summons in the matter of a mortgage dated May 5, 1937, made between John Lavenstein (now deceased) and William Franklin of the one part and the Midland Bank, Ltd., of the other part, and in the matter of the Courts (Emergency Powers) Acts, 1939 and 1940. By that originating summons, the bank asked that, notwithstanding the Acts which I have mentioned, they might be at liberty to proceed to exercise any remedies which might be available to them by way of the appointment of a receiver of the property mortgaged and the realisation of a security comprised in, or subject to, the mortgage. On that application, the master made an order on Mar. 27, 1941, in the following terms :

> It is ordered that the applicants be at liberty to proceed to exercise any remedy which may be available to them by way of the appointment of a receiver of the property comprised in the said mortgage and the realisation of the security created thereby.

At the time when the master made the order, the surviving mortgagor, Franklin, did not ask for an adjournment to the judge, but on Apr. 16, 1941, he issued a notice of motion asking that the master's order might be reversed and that it be ordered that the bank be not at liberty to proceed to exercise any remedy which might be available to them by way of the appointment of a receiver of the property comprised in the mortgage and the realisation of the security created thereby, and it is that motion which is now before me.

The Courts (Emergency Powers) Act, 1939, s. 1 (2), provides as follows :

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court :—(*a*) to proceed to exercise any remedy which is available to him by way of . . . (ii) the taking of possession of any property or the appointment of a receiver of any property . . . (iv) the realisation of any security or the forfeiture of any deposit . . .

Sect. 1 (4) provides as follows :

> If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsects. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation in question, is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.

The master took the view, I understand, that Franklin could not avail himself of the protection afforded by sect. 1 (4) of the Act, because he was not under any personal liability to discharge the debt secured by the mortgage in question, and, therefore, he was not the person liable to perform the obligation in question within the meaning of the subsection. The surviving mortgagor, Franklin, contended before the master that he came within the terms of subsection (4), and he sought to prove that he was unable to perform the obligation by reason of the present war. He also filed certain evidence relating to the position of a company named L.T.C., Ltd., to which I shall refer later. In arriving at his decision, the master relied upon the decision of FARWELL, J., in *Re National Provincial Bank, Ltd.* (1), and held that that decision covered the present case.

Two arguments were put to me by counsel for the mortgagor, Franklin. He submitted, first, that the present case is distinguishable from *Re National Provincial Bank, Ltd.* (1), because, on the true construction of the mortgage of May 5, 1937, mentioned in the title to the originating summons, Franklin was under a personal liability in respect of the debt thereby secured, though his personal liability was limited to a sum equal to the value of the mortgaged property. Secondly, he submitted that, even if his first argument were wrong and the present case were not distinguishable from *Re National Provincial Bank, Ltd.* (1), nevertheless, on the facts, the master made the wrong order. Counsel drew attention to the last sentence of the judgment of FARWELL, J., in *Re National Provincial Bank, Ltd.* (1), at p. 100 :

> So far as this particular summons, which is a summons taken out by the bank against Liddiard, is concerned, I can do nothing more than dismiss it, on the ground that no leave is necessary, because the case is not one which is provided for by the Act itself.

In view of this sentence in the judgment of FARWELL, J., counsel for the mortgagor submitted that the master should have dismissed the present summons.

The first point depends entirely on the construction of the mortgage of May 5, 1937. This deed was a mortgage of certain property made :

> . . . in consideration of the bank at the request of the mortgagors making or continuing advances or otherwise giving credit or affording bank facilities for as long as the bank should think fit to L.T.C., Ltd., 74 Great Hampton Street Birmingham (hereinafter called the principals) upon the terms that the bank shall be secured as hereinafter appearing.

The principal debtor in respect of the debt to secure which the mortgage was given was L.T.C., Ltd. The deed contains no covenant by the mortgagor to pay the sum advanced by the bank to L.T.C., Ltd., or any part of such sum, but counsel for the mortgagor relied on two passages in the deed which I must now read. The first passage is as follows :

> And it is hereby also agreed and declared that although as between the principal and the mortgagor the said premises [the mortgaged premises] may be liable and charged only secondarily and by way of guarantee yet as between the mortgagor and the bank the said premises shall be deemed to be liable and charged primarily and as for moneys primarily due from the mortgagor and accordingly that the bank shall be at liberty without thereby affecting their rights hereunder at any time to determine enlarge or vary any credit to the principal to vary exchange or release any other securities held or to be held by the bank for or on account of the moneys intended to be hereby secured or any part thereof to renew bills and promissory notes in any manner and to compound with give time for payment to accept compositions from and make any other arrangements with the principal or any obligants on bills notes or other securities held or to be held by the bank for or on behalf of the principal.

The second passage is as follows :

> And it is hereby lastly declared that although the liability of the mortgagor hereunder cannot exceed the value of the said premises yet these presents shall be construed and take effect as a guarantee of the whole and every part of the principal moneys and interest owing and to become owing as aforesaid and accordingly the mortgagor shall not be entitled as against the bank to any right of proof in the bankruptcy or insolvency of the principal or other right of a surety discharging his liability in respect of the principal debt unless and until the whole of such principal moneys and interest shall have first been completely discharged and satisfied.

For my part, I can find nothing whatever in the first of these passages which can impose a personal liability on the mortgagor to pay any sum of money. As to the second passage, there is a portion of it which reads as follows :

> . . . although the liability of the mortgagor hereunder cannot exceed the value of the said premises yet these presents shall be construed and take effect as a guarantee of the whole and every part of the principal moneys and interest owing and to become owing as aforesaid . . .

If that part is divorced from its context, it might well convey the impression that a personal liability was imposed on the mortgagor up to, but not exceeding, the value of the mortgaged property, but the provision in which this passage occurs is one directed solely to limiting the mortgagor's right of proof in the bankruptcy of the principal debtor. In my view, the wording of the passage in question is unfortunate. I think that it is merely intended to point out that the security given is a security for the whole of the sum owing by L.T.C., Ltd., though the maximum loss which the mortgagor can suffer, if the security is enforced, is the value of the mortgaged property. Reading the deed as a whole, I cannot construe this passage as imposing upon the mortgagor a personal liability for the payment of money. Testing the matter by considering whether the bank could recover any sum of money in any action against the mortgagor, either before or after the security has been realised, I think that it is plain that any such claim by the bank must fail.

The result is that, in my judgment, the present case cannot be distinguished from *Re National Provincial Bank, Ltd.* (1), and the reasoning of FARWELL, J., in that case leads to the conclusion that Franklin is not the person liable to perform the obligation within the meaning of sect. 1 (4) of the Act. Therefore, that subsection gives him no protection.

In *Re National Provincial Bank, Ltd.* (1), FARWELL, J., said, at pp. 99, 100 :

> The question is whether in this case Liddiard, who is the respondent, is able to satisfy the court that he is a person liable to perform the obligation against which he is seeking this relief. " The obligation " must mean, as it seems to me, the obligation which arises under the mortgage which the mortgagee is seeking to enforce. The mortgagee's only right to take possession of the property and realise his security is such right as he may have against the mortgagor by virtue of his mortgage. Therefore, in order that the matter may come within subsect. (4), I think that it is necessary to find that there is an obligation on the mortgagor which he is unable to satisfy by reason of circumstances directly or indirectly attributable to the war. In the present case, so far as I can see, he is under no obligation whatsoever to the bank. He is in this position. The bank has demanded payment of the money owing by Mrs. Milburn. That does not create an obligation upon the mortgagor to pay anything. It puts him in this position. Either he must find the money which is demanded or the mortgagees will be entitled to realise their security. The fact that he is put in that dilemma does not create an obligation of any sort or kind upon him. If he chooses not to pay, or is unable to pay, he may find himself in the unhappy position of having his property taken away from him. That may be his misfortune, but that does not create an obligation upon him which he has to satisfy and which arises from the mortgage into which he has entered. The mortgage creates no such obligation whatsoever.
>
> The position is, therefore, that this is not a case, as it seems to me, which comes within the Act at all. It may be that it is a *casus omissus*. It may be that, if the Act had intended to protect a person in the position of the mortgagor in this matter by giving an opportunity of getting relief under the Act, it would have so provided, but it has not, so far as I can see, on the language of the Act, made any such provision for this particular case, and, in the circumstances, it is not for me to make a remedy by giving to the words " perform the obligation " a meaning which, in my judgment, they cannot bear. The truth of the matter is that this does not come within the Act at all.

Here again, I think that the judge was clearly referring to sect. 1 (4) of the Act. He continues as follows, at p. 100 :

> This mortgagor is in the unfortunate position of not being able to take the remedy open to him of relieving his property by paying money which Mrs. Milburn owes . . .

I think that there must have been evidence before the judge in that case that the mortgagor was unable to take this remedy by reason of his financial circumstances, but that does not clearly appear from the report. Then the judge continues as follows, at p. 100 :

> . . . but that does not create an obligation upon him to pay the money, and the fact that he cannot pay will have the result that the bank will be entitled to exercise their remedies by way of realising the property. I am unable in this case to give the respondent any relief under the Courts (Emergency Powers) Act, 1939, not because he has not shown sufficient cause—because I have not considered that at all—but because, in my judgment, the Act does not provide for this particular case.

I respectfully agree with the passage which I have just read.

I now come to counsel's second point. He says truly that the order made by the master is not the order which was made by Farwell, J., in *Re National Provincial Bank, Ltd.* (1). Farwell, J., said, at p. 100 :

> So far as this particular summons, which is a summons taken out by the bank against Liddiard, is concerned, I can do nothing more than dismiss it, on the ground that no leave is necessary, because the case is not one which is provided for by the Act itself.

In my view, however, when he said that, his attention was not directed to the fact that sect. 1 (2) made it obligatory on the mortgagee in *Re National Provincial Bank, Ltd.* (1), and makes it obligatory on the mortgagee in the present case, to obtain the leave of the court before realising his security. I think that the passages which I shall now quote show quite clearly that this point was not present to the judge's mind. In the first place, the statement of the facts, which is very brief, is as follows, at p. 97 :

> This summons raises a curious point. It is an application by the National Provincial Bank, Ltd., against one Thomas Edmund Liddiard for (i) realisation of certain property in Tunbridge Wells which was mortgaged by Liddiard to the bank by a mortgage, dated Apr. 1, 1935, made between Liddiard of the one part and the applicants of the other part to secure the moneys more particularly referred to therein, or (ii) the appointment of a receiver of the rents and profits, or (iii) the taking possession thereof. The bank seek the leave of the court to exercise their remedies as mortgagees by taking possession of the property and exercising their other rights. Evidence has been filed by the respondent giving reasons why the court ought not to permit the mortgagees to exercise their powers, having regard to circumstances which have arisen, and which, according to the respondent's evidence, are directly or indirectly due to the war, and sufficient to entitle the mortgagor to relief under the Act.

That, then, was the contention put before Farwell, J., and there is a passage in the judgment which I ought to read as showing that it was that argument which he was considering. Farwell, J., said, at p. 98 :

> In the circumstances, the bank, being desirous of exercising their right to possession of the property, have applied to the court for leave under the Courts (Emergency Powers) Act, 1939. Having applied for such leave, they are now coming to the court and saying that they do not in fact require any leave in this case, because the Courts (Emergency Powers) Act, 1939, does not apply in this particular case, and that, therefore, they are entitled to proceed to exercise their remedies without having to obtain the leave of the court at all.

> The question which arises—and I think that it is of some difficulty—is whether the true view is that the leave of the court is not necessary at all in this particular case, or whether the true view is that they have to obtain the leave of the court, in which case it will be necessary for the court to go into all the circumstances and see whether or not this is a case in which the mortgagees should be given leave, and, if so, on what particular terms, to employ the remedies otherwise open to them.

It is plain from these passages that the case before Farwell, J., was argued on the footing that, if the mortgagor could not bring himself within the provisions of sect. 1 (4), there was no need for the mortgagee to apply for the leave of the court. I have no doubt that, if his attention had been directed to the terms of sect. 1 (2), Farwell, J., would have given the leave which was sought by the summons, and would not have expressed the view that no leave was necessary. Accordingly, I think it is right in the present case to order that the applicants be at liberty to exercise any remedy which may be available to them by way of the appointment of a receiver of the property comprised in the mortgage and the realisation of the security thereby. The result is that this motion must be dismissed with costs.

I may add that, when I was in the course of considering my judgment, another aspect of the matter occurred to me. Although Franklin is not the person liable to perform the obligation within the meaning of subsect. (4), and although he owes no debt to the bank, there is a person—namely, L.T.C., Ltd.—who is liable to pay the debt to secure which the mortgage was given, and who is liable to perform the obligation to secure the performance whereof the mortgage was given. It seemed to me to be arguable that, if the court was satisfied that L.T.C., Ltd., was unable immediately to perform the obligation by reason of circumstances directly or indirectly attributable to the present war, it might be able to give some relief under the subsection to Franklin. It seems not unreasonable that a person who has mortgaged the property to secure the debt of another person should be able to say: "I tender evidence which shows that, but for the war, the principal debtor would have performed his obligations. If he had done so, the mortgagee would not have had recourse to my property to obtain payment. Therefore, my present position is one which the Act was intended to cover, and, further, by my evidence I have brought the case within the wording of the subsection. If the court is of opinion that the principal debtor is unable to perform his obligation by reason of certain circumstances directly or indirectly attributable to the present war, leave can be given to me." It does not appear that any such argument was addressed to Farwell, J., and I do not know whether any evidence as to the reasons for the principal debtor's inability to pay his debt was before Farwell, J. Before delivering this judgment, I asked counsel for the respondent bank to deal with this argument, as Franklin has filed evidence in the present case that the war has completely ruined the business of L.T.C., Ltd., and he adds certain particulars in regard to that. Counsel for the bank has satisfied me, however, that the only person to whom relief can be given under the section is the person

described as the person liable to perform the obligation in question. I respectfully agree with FARWELL, J., that the present case is a *casus omissus.* I think that the omission to make provision for such a case as the present may cause considerable hardship, but, on the wording of
A subsect. (4), I have arrived at the conclusion, as I have already said, that this motion must be dismissed.

Motion dismissed with costs. Leave to appeal to the Court of Appeal.

B Solicitors: *Page, Moore & Page* (for the applicant); *Beale & Co.* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re HUTLEY'S LEGAL CHARGE, BARNES *v.* HUTLEY.

[CHANCERY DIVISION (Morton, J.), **April 29, 30, 1941.**]

D *Emergency Legislation—Whether Courts (Emergency Powers) Act,* 1939, *and Possession of Mortgaged Land (Emergency Provisions) Act,* 1939, *binding on the Crown.*

By a legal charge, dated June 5, 1928, and made between the defendant as mortgagor and the plaintiff as mortgagee, the defendant's farmland and premises were charged, pursuant to the Public Works Loans Act, 1875, and the Agricultural Credits Act, 1923, to secure £5,625 and
E interest. The plaintiff was the secretary of the Public Works Loan Commissioners. In 1940 the military authorities for a short time took possession of part of the property and on July 25, 1940, the Essex War Agricultural Executive Committee, under the powers given by the Defence (General) Regulations, 1939 took possession of all the property subject to the charge except the dwellinghouses and certain saltings.
F Thereafter defendant fell into arrear with the payments of principal and interest covenanted to be made under the legal charge, and this summons was determined on the footing that the plaintiff had for that reason taken possession of that part of the property charged which was not in the possession of the Essex War Agricultural Executive Committee. Under the Compensation (Defence) Act, 1939, certain compensation would be payable to the defendant by the Minister of Agriculture and Fisheries,
G and also perhaps by the Secretary of State for War, although the latter had denied liability. Upon the facts, the following questions arose (i) whether the moneys accruing due under the legal charge were a debt due to the Crown; (ii) whether the Crown was bound by the Courts (Emergency Powers) Act, 1939, and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939; and (iii) what part of the compensation was comprised in the legal charge:—

H HELD: (i) the Courts (Emergency Powers) Act, 1939 and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, did not bind the Crown.

A.-G. of the Duchy of Lancaster v. *Moresby* (1) *distinguished.*

(ii) on the construction of the Public Works Loans Act, 1875, and in particular sects. 18, 33, and 50 thereof, the debt owing to the plaintiff was a debt due to the Crown and the plaintiff was entitled to possession of the land.

(iii) Having regard to the Public Works Loans Act, 1875, s. 22, compensation payable under the Compensation (Defence) Act, 1939, s. 2 (1) (*a*), was payable to the plaintiff as a person who would be for the time being entitled to occupy the land.

[**EDITORIAL NOTE.** Although, perhaps, the position here is not completely A
covered by the authority of *A. G.* v. *Hancock* (2), that decision has been followed in preference to the decision on the Courts (Emergency Powers) Act, 1917, of ROWLATT, J., in *A.-G. of the Duchy of Lancaster* v. *Moresby* (1). The remainder of the case considers the position of debtors under mortgages granted by the Public Works Loan Commissioners, which have generally been made for purposes of land improvement, but in recent years loans have been made by the commissioners B
for minor alterations and small additions to farm buildings. These are often secured by a rentcharge, and the decision is important as being applicable to that form of security as well as to mortgages.

AS TO DEBTS DUE TO THE CROWN, see HALSBURY Hailsham Edn., Vol. 6, p. 584, para. 749; and FOR CASES, see DIGEST, Vol. 11, pp. 581, 582, Nos. 830-839.]

C

Cases referred to:

(1) *A.-G. of Duchy of Lancaster* v. *Moresby*, [1919] W.N. 69; 42 Digest 692, *1070*.
(2) *A.-G.* v. *Hancock*, [1940] 1 K.B. 427; [1940] 1 All E.R. 32; Digest Supp.
(3) *Irish Land Commission* v. *O'Neill*, [1915] 2 I.R. 66; 11 Digest 582, case *e*.
(4) *Re Ind, Coope & Co., Ltd., Fisher* v. *Ind, Coope & Co., Ltd., Knox* v. *Ind, Coope & Co., Ltd., Arnold* v. *Ind, Coope & Co., Ltd.*, [1911] 2 Ch. 223; D
39 Digest 251, *360*; 80 L.J.Ch. 661; 105 L.T. 356.

ADJOURNED SUMMONS to determine (i) whether the plaintiff as chargee was entitled to possession of the property comprised in the charge dated June 5, 1928, notwithstanding the operation of the Courts (Emergency E
Powers) Act, 1939, and the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, and whether the debt due to the plaintiff was a debt due to the Crown, and (ii) what part of the compensation moneys payable under the Compensation (Defence) Act, 1939, was comprised in the charge. The facts are fully set out in the judgment. The second F
defendants were Barclays Bank, to whom the plaintiff had given an agricultural charge, but it was found that the question whether they might be entitled to any part of the compensation could not be determined at the time when this summons was heard.

C. D. Myles for the plaintiff. G

A. Melford Stevenson for the first defendant.

R. W. Goff for the second defendants.

MORTON, J.: This is a summons taken out in the matter of a legal H
charge dated June 5, 1928, made between the defendant Ralph Hutley of the one part and the plaintiff Henry George Herbert Barnes of the other part. The plaintiff, who is the secretary of the Public Works Loan Commissioners, is named as chargee under the legal charge which I have mentioned, which was a charge on premises known as Little Oakley Hall Farm, Dovercourt, in the county of Essex.

The first question on the summons is as follows:

> Whether having regard to the provisions of the Public Works Loans Act, 1875, and the Agricultural Credits Act, 1923, and to the true construction of the above-mentioned legal charge, the plaintiff as Secretary of the Public Works Loan Commissioners is entitled to take possession of the property comprised in the above-mentioned legal charge (subject to the rights if any of His Majesty's Secretary of State for War and to the rights if any of His Majesty's Minister of Agriculture and Fisheries or of the Essex War Agricultural Executive Committee) notwithstanding the provisions of the Courts (Emergency Powers) Act, 1939, and of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, or only with the leave of the court under the last-mentioned Acts.

The question which I have to decide under that first paragraph of the summons may be quite briefly stated as follows. First of all, I have to decide whether or not the two Acts of 1939 mentioned in the summons bind the Crown, and, secondly, if they do not bind the Crown, I have to decide whether or not the debt secured by this legal charge is a debt owed to the Crown.

The facts of the case are these. The legal charge, dated June 5, 1928, is made between Ralph Hutley of the one part and Henry George Herbert Barnes of the other part. Barnes is described in the charge as:

> . . . of the Public Works Loan Office Old Jewry in the city of London Esquire (hereinafter called the secretary) the secretary of the commissioners for carrying into execution the Public Works Loans Act, 1875, which commissioners are called the Public Works Loan Commissioners (hereinafter referred to as the loan commissioners).

The first recital is a recital of the relevant portion of the Agricultural Credits Act, 1923, which enacts as follows:

> . . . at any time within 5 years after the passing of the said Act and subject to such conditions as the Treasury might prescribe and up to an aggregate amount approved by the Treasury the loan commissioners might in manner provided by the said Public Works Loans Act 1875 as amended by sect. 1 of the said Act lend to any approved association such money as the association might require for the purpose of making advances on mortgages to which the said section applied (which mortgages were thereinafter referred to as recognised mortgages) and might make advances to borrowers on recognised mortgages. (2) The borrower is seised of the property described in the schedule hereto in fee simple in possession free from incumbrances.

The next recital states the date when the borrower agreed to purchase the property and a recital of the fact that the property is wholly or mainly agricultural land, that recital being directed to showing that the transaction in question is authorised by the Act. Then there is a recital that the borrower has applied to the loan commissioners for an advance of £5,625 on the security of the property and that the loan commissioners are resolved to make such advance:

> . . . upon having the repayment thereof with interest at the rate of £5 per centum per annum (hereinafter called the mortgage rate) secured in manner hereinafter appearing.

Then there is a recital as follows:

> Pursuant to such application and resolution the loan commissioners have delivered to the borrower or to his order a certificate in respect of which the borrower is entitled to receive the sum of £5,625 (hereinafter called the said loan) from the Commissioners for the Reduction of the National Debt (the delivery in manner aforesaid and receipt of which certificate the borrower hereby acknowledges).

I have referred to these recitals fully in order to show the precise nature of this transaction.

The operative part of the deed follows, cl. 1 of which provides as follows :

> The borrower hereby covenants with the secretary as follows : (1) To repay on Dec. 5 next to the cashiers of the Bank of England at their principal office (to the use of His Majesty his heirs and successors) the said loan with interest thereon at the mortgage rate (such interest to be computed from the day mentioned for such purpose at the foot of the said certificate).

It is to be observed that the money lent is repayable to the use of His Majesty, his heirs and successors. Then there is a proviso for payment of interest " to the said cashiers at the office aforesaid (to the use aforesaid) " by half-yearly payments on Dec. 5 and June 5 in every year. In cl. 2, there is a charge by way of legal mortgage on the property described in the schedule :

> . . . with the payment of all principal money and interest and other money hereby covenanted to be paid in accordance with the covenants by the borrower herein contained.

Clause 3 (i) provides as follows :

> For the purposes of this deed the legal right of redemption hereunder shall be deemed to cease on Dec. 5 1928.

Subclause (ii) provides as follows :

> The benefit of all charges herein contained and the right to enforce and exercise all remedies securities and powers hereby conferred or arising hereunder shall be vested in the secretary.

There follows the proviso for redemption which I think I need not read in full. As one would expect, it again provides for payment of the money to the cashiers at the office aforesaid to the use aforesaid, and the payments provided for in the clause giving the right of redemption are payments of interest together with instalments of principal. It is provided that, if these payments are made :

> . . . then and in that case the borrower shall not be required to repay the said loan or any part thereof otherwise than by means of the said half-yearly instalments and final payment mentioned in this clause.

Then there is a proviso in the following terms :

> Provided always that if any power of sale affecting the scheduled property whether conferred by this deed or otherwise shall at any time hereafter become exercisable then and in such case the whole of the said loan for the time being remaining unpaid shall (upon a demand in writing being delivered or sent by post to the borrower or left upon the scheduled property) forthwith become due and payable from and by the borrower to the said cashiers at the office aforesaid (to the use aforesaid) and together with any instalments and money then in arrear shall be recoverable by the secretary with interest at the mortgage rate by action against the borrower or by exercise and enforcement of any of the powers and remedies of the secretary in that behalf.

It is provided further as follows :

> (ii) The borrower shall not be entitled to repay the said loan or any part thereof otherwise than by means of such half-yearly instalments and final payment as aforesaid. (iii) Notwithstanding the provisions of this clause but without prejudice to the same the principal money hereby secured shall be deemed to become due within the meaning of the Law of Property Act 1925 and for all the purposes of that Act on the day on which the same is hereinbefore covenanted to be paid.

This is followed by certain covenants by the borrower dealing with such matters as repairing and insuring, the payment of rates and taxes, and so on. There is also a covenant as follows:

> . . . during the continuance of this security the borrower will in all respects cultivate and manage the scheduled property and every part thereof in a good and proper and husbandlike manner.

Then there are powers of inspection given to the secretary.

I can pass on to cl. 6, the first part of which provided as follows:

> The secretary may at any time after the execution of this deed sell the scheduled property or any part thereof or appoint a receiver of the income of the scheduled property or any part thereof in like manner as if the statutory power of sale or appointment of a receiver under the said Public Works Loans Act, 1875, or the Law of Property Act 1925 had respectively arisen . . .

That, however, is qualified by cl. 7, which provides, as far as material, as follows:

> The secretary shall not exercise the power of sale or appointment of a receiver hereinbefore contained unless and until the happening of any or either of the events following, that is to say: (1) Some instalment of principal money and interest or some part thereof shall have been unpaid for fourteen days after the day hereby appointed for payment thereof [which event has happened]. (2) Default shall have been made in the observance or performance of some covenant or provision herein contained and on the part of the borrower to be observed or performed other than and besides the covenant for payment of principal and interest.

It is alleged in the evidence that there has been a breach of covenant besides the failure to pay the instalments of principal and interest, but I do not think that I need go into that matter, as the default in payment of instalments of principal and interest does not seem to be in dispute. I pass on to cl. 10, which provides as follows:

> The borrower hereby attorns and becomes tenant from year to year to the secretary of such part or parts of the scheduled property as are in the occupation of the borrower at the yearly rent of 10*s*. (to be accepted towards payment of interest).

Then subcl. (ii) provides as follows:

> Provided always that the secretary may at any time after the power of sale hereby conferred has become exercisable without giving any previous notice to quit enter into and upon and take possession of the premises whereof the borrower has attorned tenant as aforesaid and determine the tenancy created by such attornment.

Clause 15 provides as follows:

> This deed is a recognised mortgage within the meaning of the said Act and is in the form prescribed by the loan commissioners and shall have effect accordingly under the said Public Works Loans Act 1875.

"The said Act" is the Agricultural Credits Act, 1923. Then subcl. (2) provides as follows:

> The loan commissioners have and shall have with regard to the said loan and this security all the powers which are by the last-mentioned Act given to them for recovery of loans and nothing in this deed contained shall in any way restrict the exercise by the loan commissioners or the secretary of any of those powers or any of the powers conferred on mortgagees by the Law of Property Act 1925 as well as any of the powers herein contained.

Then there follows a definition clause.

The property charged is, in all, about 837 acres, and comprises (i) a farm, dwelling-house, garden and domestic buildings, (ii) certain farm buildings, (iii) about 189 acres of land, apparently known as the Saltings, abutting on Boat Creek and Dunmore Creek, and (iv) about 337 acres of pasture, arable and woodland.

On Feb. 15, 1937, Hutley executed a second mortgage in favour of one Horace Lambert Biggs, but I do not think that that is material for the present purpose. On July 4, 1938, Hutley executed an agricultural charge in favour of Barclays Bank, and, under para. 2 of the summons, I understand that certain questions may arise as to what is covered by that agricultural charge. On Nov. 27, 1939, a notice was served on Hutley by order of the Secretary of State for War authorising the use of the mortgaged premises—except, apparently, the Saltings—for military purposes.

On Feb. 2, 1940, the adjutant of the first battalion of a certain regiment wrote to the defendant Hutley as follows :

> Further to your visit of this morning, we have now forwarded letter to the East Anglian Institute of Agriculture, Chelmsford, informing them that Little Oakley Hall Farm has been requisitioned for military training, by order of the Secretary of State for War.

Shortly before that letter was written, but after Hutley had had the notice on Nov. 22, 1939, he made default in payment of certain interest and an instalment of principal.

On Mar. 26, 1940, the colonel of a battalion of a certain regiment wrote to the defendant Hutley as follows :

> I have now heard from the Ministry of Agriculture and Fisheries that the authorities have decided not to go on with the requisitioning of your farm. You can therefore consider all requisition notices served on you as cancelled, and you should therefore comply with any ploughing-up orders that have been served upon you. I regret any inconvenience that may have been caused to you, but you will no doubt appreciate that it takes considerable time for matters to filter down through the usual channels.

On June 5, 1940, the defendant Hutley again made default in payment of an instalment of principal and interest. On July 27, 1940, the Essex War Agricultural Executive Committee, with the consent of the Minister of Agriculture and Fisheries, took possession of the mortgaged premises, except the farmhouse and the Saltings, under the Defence (General) Regulations, 1939. I have stated the facts somewhat fully, because, although they may not all be relevant on the first question which I have to decide, it seems that some or all of them may be relevant on the second question.

I now turn to the question of law whether the Courts (Emergency Powers) Act, 1939, binds the Crown. Sect. 1 (1) of that Act provides as follows :

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money . . .

Then there are certain provisions which I need not read. Subsect. (2) provides as follows :

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, (a) to proceed to exercise any remedy which is available to him by way of . . . (ii) the taking possession of any property or the appointment of a receiver of any property; (iii) re-entry upon any land; (iv) the realisation of any security or the forfeiture of any deposit . . .

The Crown is nowhere expressly mentioned in the statute, and, but for *A.-G. of the Duchy of Lancaster* v. *Moresby* (1) a decision of ROWLATT, J., I should feel no hesitation in holding that the Act did not bind the Crown, having regard to the well-known rule that, if an Act of Parliament would otherwise divest the Crown of its property, rights, interest or prerogative, it is not to be construed as applying to the Crown unless the Crown is mentioned either expressly or by necessary implication.

The matter was considered by WROTTESLEY, J., in *A.-G.* v. *Hancock* (2). The debt in that case was arrears of income tax, and WROTTESLEY, J., had to consider whether or not the Courts (Emergency Powers) Act, 1939, bound the Crown, and he came to the conclusion that it did not. With that decision I entirely and respectfully agree, and, as the authorities were very fully dealt with by WROTTESLEY, J., I do not propose to cover again the ground which was covered by him, but at p. 438 ([1940] 1 All E.R., at p. 39), having referred to the decision of ROWLATT, J., in *A.-G. of the Duchy of Lancaster* v. *Moresby* (1), he said that that case was distinguishable from the case before him. He dealt with the matter in these words, at pp. 437, 438 ([1940] 1 All E.R., at pp. 38, 39) :

> In *A.-G. of the Duchy of Lancaster* v. *Moresby* (1), therefore, ROWLATT, J., decided that section 1 (2) of that Act [the Courts (Emergency Powers) Act, 1917] applied to the Crown in the sense that it applied to a contract to which the Crown was a party but no one has ever decided that the Courts (Emergency Powers) Act, 1914, affected the Crown so as in any way to diminish its right to recover taxes. On that ground alone, the decision of ROWLATT, J., in *A.-G. of the Duchy of Lancaster* v. *Moresby* (1) is distinguishable from the present case. There are other difficulties in *A.-G. of the Duchy of Lancaster* v. *Moresby* (1). To begin with, it did not deal with a debt due to the Crown at all, but with costs. I cannot say that I agree with it if it purports to decide, quite apart from difficulties of procedure, that a subject could rely upon sect. 1 of the Act of 1917 to suspend or annul a contract with the Crown. The present case, however, is not one of a contract with the Crown. It is a case of a debt due to the Crown, not under contract but by way of tax.

Assuming that the debt with which I have to deal is a debt due to the Crown—and that is a matter with which I must deal later—it is a debt due to the Crown under the contract, and I find it impossible to draw any real distinction between the decision of ROWLATT, J., in *A.-G. of the Duchy of Lancaster* v. *Moresby* (1) and the present case. It is true that ROWLATT, J., was dealing with another statute, but I do not think that it would be right for me to attempt to draw some fine distinction which does not seem to me to be a real one. It is manifest, from the passage which I have read from *A.-G.* v. *Hancock* (2), that WROTTESLEY, J., took the view that the Courts (Emergency Powers) Act, 1939, did not bind the Crown in the case of a debt due by contract, although in fact the case before him was a debt due by way of tax.

In those circumstances, I think I am bound to choose between the decision of ROWLATT, J., in 1919, and the views expressed by WROTTESLEY, J., in *A.-G.* v. *Hancock* (2). I think that counsel in *Hancock's* case (2) was justified in saying, as he did, at p. 429 :

> There is no escape from the dilemma that either ROWLATT, J., in *A.-G. of the Duchy of Lancaster* v. *Moresby* (1) was wrong or the defendant in this case is right, for there is no material distinction between the two statutes involved.

Having regard to the views expressed by WROTTESLEY, J., in *A.-G.* v. *Hancock* (2), I do not regard myself as bound to follow the decision of ROWLATT, J. Further, it is to be observed that the action came on for trial before him merely on the question of the liability of the defendants for the costs of the action, that the arguments are not set out in the WEEKLY NOTES, so that one does not know what was or was not brought to his attention, and, further, that his reasoning in arriving at his conclusion that the Crown was bound by the Courts (Emergency Powers) Act, 1917, is set out very briefly. The case was not thought worthy of being reported in the Law Reports. In these circumstances, I have come to the conclusion that, notwithstanding the decision in *A.-G. of the Duchy of Lancaster* v. *Moresby* (1), I ought to hold, and I do hold, that the Courts (Emergency Powers) Act, 1939, does not bind the Crown in the present case.

I must now consider the other Act mentioned in para. 1 of the summons —namely, the Possession of Mortgaged Land (Emergency Provisions) Act, 1939. Sect. 1 of that Act provides as follows :

> (1) Where any land is the subject of a mortgage made before Sept. 3, 1939, the mortgagee shall not be entitled to obtain possession of the land, unless default has been made in payment of the mortgage money or any part thereof or of any interest thereon, or there has been a breach on the part of the mortgagor, or of some person concurring in the making of the mortgage, of any obligation arising under or by virtue of the mortgage, other than an obligation to pay the mortgage money or interest thereon. (2) For the purposes of this section default shall not be deemed to have been made in payment of any mortgage money, unless a written demand for payment has been served on the person liable, and a period of 3 months has elapsed since the service of the demand : provided that this subsection shall not apply where the mortgage money is repayable by instalments . . .

It appears to me, on the facts, that this Act would not constitute a barrier to the plaintiff in the present proceedings, even if the Crown were bound by the Act, because there has been default in payment of principal and interest and the mortgage money is repayable by instalments, but it appears to me that there is no more reason for thinking that the Act which I am now considering binds the Crown than there is for thinking that the Courts (Emergency Powers) Act, 1939, does so. In neither Act is the Crown expressly mentioned, and, for my part, I cannot see that the Crown is mentioned by necessary implication in either Act.

I now turn to the second question, namely, whether the debt secured by this legal charge is a debt owed to the Crown. For that purpose, I turn first to the Agricultural Credits Act, 1923. Sect. 1 is described as :

> Power to Public Works Loan Commissioners to lend money to associations for the purpose of making advances upon certain mortgages.

Sect. 1 (1) provides as follows:

> At any time within 5 years after the passing of this Act, and subject to such conditions as the Treasury may prescribe, and up to an aggregate amount approved by the Treasury, the Public Works Loan Commissioners may, in manner provided by the Public Works Loans Act, 1875, as amended by this section, lend to any approved A association such money as the association may require for the purpose of making advances on mortgages to which this section applies (which mortgages are hereinafter referred to as recognised mortgages) and for recouping to such an association any moneys raised by the association before the passing of this Act for the purpose of making advances . . . and may make advances direct to borrowers on recognised mortgages, or at any time take a transfer of any recognised mortgage.

What has been done in the present case is that there has been an advance B direct to a borrower on a recognised mortgage. Sect. 1 (2) provides as follows:

> A mortgage shall be deemed to be a recognised mortgage if it complies with the following conditions: (*a*) the borrower must be a person who has agreed to purchase the land comprised in the mortgage not earlier than Apr. 5, 1917, nor later than June 27, 1921, or the heir, devisee, or personal representative of such C a person; (*b*) the land comprised in the mortgage must be wholly or mainly agricultural land . . .

I do not think that I need read the rest of the provisions of this subsection, but the two paragraphs which I have read afford an explanation of the recitals in the document of 1928.

D I now turn to the Public Works Loans Act, 1875, as there is a reference to that Act in sect. 1 (1) of the Act of 1923. The loans are to be made:

> . . . in manner provided by the Public Works Loans Act, 1875, as amended by this section . . .

The Public Works Loans Act, 1875, s. 4, provides as follows:

> E For the purpose of loans out of moneys issued in pursuance of this Act, and for the purpose of the execution of this Act and of any enactment passed or hereafter to be passed authorising or referring to such loans, there shall be a body of commissioners (in this Act referred to as the loan commissioners) who may be styled the Public Works Loan Commissioners . . .

It is unnecessary to read the rest of the section, which deals with such F matters as the appointment and tenure of office of Public Works Loan Commissioners. Sect. 5 provides as follows:

> With respect to the loan commissioners the following provisions shall have effect: (1) The loan commissioners may sue and be sued in the name of their secretary for the time being; and no action or suit in law or equity brought or commenced by or against the said commissioners in the name of their secretary G for the time being shall abate or be discontinued by the death or removal of such secretary, or by the act of such secretary without the consent of the said commissioners; but the secretary to the said commissioners for the time being shall always be deemed the plaintiff or defendant in such action or suit as the case may be . . .

That provision explains why the plaintiff in the present case is Barnes, the H secretary of the loan commissioners. At the end of sect. 7 there occurs the following provision:

> Where the secretary of the loan commissioners is a party to any action, suit, or other legal proceeding, such secretary acting under the direction of the commissioners shall be deemed to represent the Crown, so far as regards the interest of the Crown in any loan granted under this Act or any money due under a security for any such loan, and it shall not be necessary to make the Crown or any other person on behalf of the Crown, a party to such action, suit, or proceeding, in respect of such interest as aforesaid.

Then sect. 8 provides as follows :

> All conveyances, leases, mortgages, releases, arrangements, and things which the loan commissioners are authorised by this Act to grant, execute, make, or concur in, and all powers, acts, and things which the loan commissioners are authorised by this Act to exercise, do, or concur in, in relation to any mortgaged property or rate, may be granted, executed, made, concurred in, exercised, and done by their secretary for the time being under their direction, and when so granted, A executed, made, concurred in, exercised, and done by such secretary, shall be deemed to have been granted, executed, made, concurred in, exercised, and done by him under the direction of the commissioners, unless the contrary is shown by some person interested in contesting the validity thereof.
>
> Any property, chose in action, estate, interest, powers, authorities, and privileges vested in or exerciseable by the secretary of the commissioners in pursuance of this Act shall be dealt with and exercised by him under the direction of the commis- B sioners and not otherwise.

Sect. 9 provides :

> The loan commissioners may, if they think it expedient, from time to time, in manner mentioned in this Act, make loans for the purpose of any of the works mentioned in the first schedule to this Act, to any person having power under an Act of Parliament or otherwise to borrow for such purpose . . . C

Sect. 18, which is, I think, a very material section on the question of whether the debt which I am now considering is one owed to the Crown, provides as follows :

> Where a loan is granted by the loan commissioners on the security of a mortgage of any property (whether with or without any other security), the property from D and after the date of the mortgage shall be charged with the payment to the use of Her Majesty of the loan with interest as in the mortgage mentioned, in priority, save so far as otherwise specified in the mortgage, over every other debt, mortgage, or charge whatsoever affecting the property . . .

That section, and certain other sections to which I shall refer, make the task of counsel for the respondent, in contending that this is not a debt E owed to the Crown a very difficult one, but he has assisted the court by directing my attention to every consideration which could properly be urged against that view. Sect. 20 provides as follows :

> All securities for any loan granted by the loan commissioners in pursuance of this Act may be given to the secretary of the commissioners on their behalf. Every F such security is in this Act referred to as a security given to the commissioners.

Then sect. 32 provides as follows :

> Every security given under this Act may be in such form as may be prescribed, and the fact of the secretary of the loan commissioners being a party thereto shall be conclusive evidence that the same is in the prescribed form, and every such security shall be valid and effectual to pass all the estate, right, and interest G purporting to be passed thereunder by the parties executing the same, subject to the provisions of this Act.

Sect. 33, which is, again, a very material section, provides as follows :

> Every sum payable under any security made in pursuance of this Act shall be made payable to the use of Her Majesty, and may be recovered as a specialty H debt due to the Crown, in like manner as if the security had been made in the form provided by [Crown Debts, 1541-42] ; but no person shall be liable for any larger sum than that which he is expressed to be bound to pay.
>
> Every sum payable in respect of a loan granted by the loan commissioners (either before or after the passing of this Act) or under the security for such loan, shall be compounded for or released only under the authority of Parliament in each case.
>
> The loan commissioners may issue a warrant to the proper officer forthwith to enforce payment of such debt to the Crown as aforesaid.

The only other sections to which it is necessary to refer are sects. 50 and 51. Sect. 50 provides as follows :

> Except so far as a special Act, by express reference to some part of this Act, alters that part, every loan made by the loan commissioners shall, notwithstanding any provision in such special Act and any rule of law or custom, be made in accordance with and under the powers of this Act, and be repayable in manner provided by this Act . . . and every such loan, together with the security for the same, shall have the priority and be subject to the powers, authorities, and remedies mentioned in this Act ; and although made in pursuance of a special Act, shall be deemed for all purposes to be a loan under this Act.

The words " special Act " are defined in sect. 51 as follows :

> The expression " special Act " means any Act passed before the passing of this Act which authorises the loan commissioners to lend money for the purposes of any work mentioned in the first schedule to this Act and any Act passed after the passing of this Act, which authorises the loan commissioners to lend money for any purpose.

The effect of that is that this loan, made under the provisions of the Agricultural Credits Act, 1923, is to be deemed for all purposes to be a loan under the Public Works Loans Act, 1875.

Having regard to the sections which I have read, and, in particular, to sects. 18, 33 and 50, I think that I must necessarily come to the conclusion that the debt secured by the mortgage of 1928 is a debt owed to the Crown. I am assisted in coming to that conclusion by *Irish Land Commission* v. *O'Neill* (3), but, even without that assistance, I should have come to the same conclusion simply on the wording of the statutes to which I have referred.

The second question arising in this summons is as follows :

> Whether the whole or some only and what part of any compensation moneys payable by His Majesty's Secretary of State for War and by His Majesty's Minister of Agriculture and Fisheries or the Essex War Agricultural Executive Committee under the Compensation (Defence) Act, 1939, is comprised in the security of the plaintiff created by the above-mentioned legal charge and in particular whether any such compensation moneys as may be payable under sect. 2 (1) (*c*) of the last-mentioned Act are comprised in the said security.

The present position is this. His Majesty's Secretary of State for War has not admitted, so far, that any compensation moneys are payable under the Compensation (Defence) Act, 1939, by reason of anything which has been done by the military authorities. So far as regards the Minister of Agriculture and Fisheries and the Essex War Agricultural Executive Committee, as I have already stated, the Essex War Agricultural Executive Committee took possession of the mortgaged property, with the exception of the saltings and the dwelling-house, on July 25, 1940, in pursuance of the powers vested in them by the Defence (General) Regulations, 1939, and the deponent says that he verily believes that they are still in possession of, and are cultivating, the same. No compensation money has actually been paid by the Minister of Agriculture or by the committee, except to the extent that, since the summons was issued, and since the evidence was filed, counsel for the applicant has been supplied with the following facts by his instructing solicitors, which facts must be put in evidence before the order on this question of the summons is drawn up.

It is apparently the fact that about the beginning of April, 1941, the Minister of Agriculture authorised the payment by the Essex War Agricultural Executive Committee of £20 on account of the compensation due under the Compensation (Defence) Act, 1939, and it was not possible at that stage to allocate the payment to any particular head of compensation, so that the payment was one in respect of the compensation in general. That money is held by a person to whom it was paid pending the decision as to the parties who are entitled to any compensation paid under the Act of 1939.

When this matter came before me, I was inclined to think that it would not be right to decide it, because I am asked to decide what the rights of the plaintiff will be when he has gone into possession of the mortgaged property, or such part of it as is not actually occupied by the Essex War Agricultural Executive Committee. Further, as no sum has yet been allocated as compensation under any particular head of the Compensation (Defence) Act, 1939, s. 2, again, any decision would be a hypothetical one, on the footing that some part of the compensation was allocated to some particular subheading of the section.

However, counsel for the applicant informs me that, in view of my decision on the first question in this summons, his clients intend forthwith to go into possession, subject as mentioned in the first question in the summons, and I am prepared to decide the matter on the footing that the order which I make will not be drawn up until this court has been satisfied by evidence that the plaintiff has gone into possession.

As regards the other difficulty—namely, that no part of the £20 has been allocated to any particular head—it appears to be reasonably clear that some part of the £20 will be payable under the Compensation (Defence) Act, 1939, s. 2 (1) (*a*), and, that being so, in order to assist the parties in these difficult times, I am willing to decide the question on the footing that the plaintiff has gone into possession, and that compensation is payable in respect of the matters mentioned in sect. 2 (1) (*a*) of the Act of 1939.

Counsel for the applicant submits that any compensation so payable is payable to the plaintiff, and he first of all founds his argument on the Public Works Loans Act, 1875, ss. 21, 22. Sect. 21 provides as follows:

> Where a mortgage of property has been given to secure any loan granted by the loan commissioners, and default is made in making payment according to the terms of such mortgage, then at any time after such default and without any consent on the part of any person interested in the equity of redemption of the mortgaged property, the commissioners, without prejudice to any other remedy, shall have power to do all or any of the following things; namely,—(1) Take possession of the mortgaged property, or any part thereof . . .

Then sect. 22 provides as follows:

> The loan commissioners, when authorised to take possession of any mortgaged property, may take possession either by themselves or by any person appointed by them (whether such person is interested in the mortgaged property or not) and upon possession of any mortgaged property being so taken,—(1) All the estate, right, interest, powers, authorities, and privileges, of what nature or kind soever, which were at the time of the making of the mortgage or may for the time being

> be vested in or exercisable by the mortgagor or any person claiming through or under the mortgagor, either in relation to the property or necessary for carrying on and managing the same, shall become vested in the secretary of the commissioners . . .

Then there are certain other very wide powers given by the section to the loan commissioners upon possession being taken, but it is not necessary for me to refer to them in detail.

I now turn to the Compensation (Defence) Act, 1939. Sect. 1 of that Act provides as follows:

> (1) Where, in the exercise of emergency powers during the period beginning with Aug. 24, 1939, and ending with such day as His Majesty may by order in council declare to be the day on which the emergency came to an end, —(*a*) possession of any land has been taken on behalf of His Majesty . . . then, subject to the following provisions of this Act, compensation assessed in accordance with those provisions shall be paid, out of moneys provided by Parliament, in respect of the taking possession of the land, the requisition or acquisition of the property, or the doing of the work, as the case may be.

The phrase "emergency powers" is defined in sect. 17 as meaning:

> . . . any power conferred by—(*a*) regulations made under the Emergency Powers (Defence) Act, 1939, as part of the law of the United Kingdom . . .

That sends one back to the Emergency Powers (Defence) Act, 1939, but it is not necessary for me to refer to that Act except to say that it is under the provisions of Defence (General) Regulations made under that Act that the Essex War Agricultural Executive Committee have taken possession of a portion of the mortgaged property. Returning now to the Compensation (Defence) Act, 1939, sect. 2 provides as follows:

> (1) The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say, —(*a*) a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land, during the period for which possession of the land is retained in the exercise of emergency powers, under a lease granted immediately before the beginning of that period, whereby the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the land in a state to command that rent . . .

Then there is a proviso as to how the sum mentioned in para. (*a*) is to be computed, which I need not read, and then subsect. (2) provides as follows:

> Any compensation under para. (*a*) of the preceding subsection shall be considered as accruing due from day to day during the period for which the possession of the land is taken in the exercise of emergency powers, and be apportionable in respect of time accordingly, and shall be paid to the person who for the time being would be entitled to occupy the land but for the fact that possession thereof is retained in the exercise of such powers; but this subsection shall not operate so as to require the making of payments at intervals of less than 3 months.
>
> For the purposes of the enactments relating to income tax and the enactments relating to land tax, and in particular for the purposes of such of those enactments as relate to the deduction of tax from rent, any compensation under the said para. (*a*) shall be deemed to be rent payable for the land, the Crown shall be deemed to pay it as tenant occupier, and the person receiving it shall be deemed to receive it as landlord.

It is to be observed that, although the sum in question is to be equal to a rent which might reasonably be expected to be payable by a tenant in occupation, and although it is to be deemed to be rent for the purposes of the enactments relating to income tax and land tax, the payment is, in fact, not rent, but compensation payable under the Act, and the person to whom it is payable is defined in subsect. (2) as being the person who for the time being would be entitled to occupy the land but for the fact that possession thereof is retained under the exercise of such powers.

In contending that the plaintiff is entitled to any sum paid under sect. 2 (1) (*a*), counsel for the applicant first of all relies upon the Public Works Loans Act, 1875, s. 22, which I have read. It is to be observed that there has not yet been any compensation allocated definitely to sect. 2 (1) (*a*). The amount of the compensation has not yet been ascertained.

Counsel for the applicant suggests that the right to receive this compensation (assuming that, but for the Public Works Loans Act, 1875, s. 22, it would be payable to Hutley) is a right, interest or privilege for the time being vested in Hutley in relation to the property, within the meaning of sect. 22 (1), and, accordingly, upon his going into possession of the mortgaged property, that right, interest or privilege became vested in the plaintiff as secretary of the commissioners. In my view, that contention is well-founded. The words of sect. 22 (1) are extremely wide, and it seems to me that this right to compensation in respect of being dispossessed of the property is a right, interest, or privilege in relation to the property. Thus it seems to me that counsel for the first respondent, Hutley, is on the horns of a dilemma. If, but for the Public Works Loans Act, 1875, s. 22, this compensation would be payable to his client, it is taken from his client and given to the plaintiff by sect. 22 of that Act. On the other hand, if, on the true construction of the Compensation (Defence) Act, 1939, the plaintiff as mortgagee, and as mortgagee having a right to possession, is the person who would be entitled to occupy the land, then again this compensation is payable to the plaintiff. Having regard to the view which I take upon the construction of the Public Works Loans Act, 1875, s. 22, it is unnecessary for me to consider the further argument put before me by counsel for the applicant, which is based upon the principles laid down in *Re Ind, Coope & Co., Ltd., Fisher* v. *Ind, Coope & Co., Ltd.* (4), at p. 230. For those reasons, on the footing that the plaintiff has already gone into possession, I propose to declare that the right to receive any compensation moneys payable by His Majesty's Minister of Agriculture and Fisheries or by the Essex War Agricultural Executive Committee under the Compensation (Defence) Act, 1939, s. 2 (1) (*a*), is vested in the plaintiff as secretary of the commissioners.

Declaration that the plaintiff is entitled to the possession of the property charged by the legal charge and that the right to receive compensation moneys payable under the Compensation (Defence) Act, 1939, 2 (1) (a) is vested in the plaintiff. Plaintiff to pay costs of first defendant taxed as between solicitor and client if not agreed, and of second defendants taxed as between party and party.

Solicitors: *J. Conway Morris* (for the plaintiff); *E. F. Iwi*, agent for

Steed & Steed, Sudbury (for the first defendant); *J. R. Welch, Son & Algar*, agents for *Turner, Martin & Symes*, Ipswich (for the second defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re FRAZER, FRAZER *v.* HUGHES.

[Chancery Division (Farwell, J.), **May 2, 1941.**]

Wills—Construction—Bequest—Income free of all taxes (including income tax) and duties—Kenya income tax—Incidence of foreign income tax.

A testator, who died in 1916 domiciled in England, directed his trustees to pay his widow out of his residuary estate such a sum as would, together with the income from his marriage settlement, amount to £2,000 per annum " free of all taxes (including income tax) and duties." In 1932, the widow took up residence in Kenya, where the income she received from the trustees became subject to Kenya income tax. She contended that the trustees should pay the amount of this tax out of the estate :—

Held : the testator did not contemplate that his widow would live abroad, and, therefore, the phrase " free of all taxes (including income tax) and duties " could refer only to such taxes and duties as were payable in England, and did not include Kenya income tax.

[**EDITORIAL NOTE.** Farwell, J., following the reasoning in *Re Norbury* (1), has come to the conclusion that, on the facts of this particular case, the expression " free of all taxes (including income tax) and duties " did not embrace Kenya income tax. The test in every case is the testator's intention as expressed in his will. Somewhat similar words were construed in *Re Quirk* (3) to cover foreign duties where the facts showed that this must have been the testator's intention, but, in this case, the judge, construing the language of the will, has been able to come to the conclusion that the terms of the will, though in terms very wide, do not extend to taxes levied outside England.

As to " Free of Tax " Provisions in Wills, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-217, paras. 386-391 ; and for Cases, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to :

(1) *Re Norbury, Norbury* v. *Fahland*, [1939] Ch. 528 ; [1939] 2 All E.R. 625 ; Digest Supp. ; 108 L.J.Ch. 219 ; 160 L.T. 572.

(2) *Re Scott, Scott* v. *Scott*, [1915] 1 Ch. 592 ; 21 Digest 130, *959* ; 84 L.J.Ch. 366 112 L.T. 1057.

(3) *Re Quirk*, [1941] 1 Ch. 46 ; Digest Supp.

Adjourned Summons to determine whether the direction in the will of the testator, John Gordon Frazer, to pay a sum of money " free of all taxes (including income tax) and duties " included Kenya income tax. The facts are fully set out in the judgment.

Geoffrey Cross for the plaintiffs, the trustees.

H. O. Danckwerts for the first defendant, the widow.

R. Jennings for the second defendant, the residuary legatee.

Farwell, J.: This summons raises a question of construction on the will of John Gordon Frazer. The question, although a short one, is not thereby necessarily easy of solution. The testator made his will on Sept. 11, 1915. He made a codicil to his will, which is not material to anything I have to decide, on July 29, 1916. He died on Aug. 1, 1916, and he left his wife and son surviving. The material part of his will is as follows. He appointed his wife and certain other people to be his executors and trustees, but his wife never in fact proved the will, nor has she taken any steps in the matter. He then gave certain specific legacies, which I need not detail. He then devised and bequeathed all " real and personal estate whatsoever and wheresoever not hereby or by any codicil hereto otherwise specifically disposed of " to his trustees upon the usual trust for sale and conversion, and directed them out of the proceeds to pay:

> . . . my funeral and testamentary expenses and debts and any legacies hereby or by any codicil hereto bequeathed and to invest the residue of the said money (if any) in or upon any of the investments hereby authorised with power that my trustees may at their discretion change such investments for any others of a like nature and upon trust that my trustees shall stand possessed of the investments herein directed to be made or authorised to be retained (including any part of my residuary estate remaining unconverted) and the investments for the time being representing the same (hereinafter called my residuary trust fund) and of the annual income thereof upon the trust following that is to say . . .

Then there is the clause which gives rise to the question which I have to decide.

> In the first place to pay out of such income to my said wife during her life without power of anticipation during any coverture such a sum as will together with the annual income received by her under my marriage settlement dated Apr. 27, 1905, produce an annual income for her of £2,000 free of all taxes (including income tax) and duties.

Then he requests that his wife and the trustees will at all times give to the trustees of his will full information as to the amount of income from the marriage settlement to enable the trustees to perform their duty. Then out of the remainder of the income he gives an annual sum to his son, and there follows provision for payments of annual sums to other persons. The residue is disposed of, and it is not necessary for me to refer to that.

The question which I have to decide has arisen in this way. On July 15, 1926, the widow married again, and since 1932 or thereabouts she and her husband, Alfred Edward Hughes, have resided in Kenya. It appears that under certain ordinances there is imposed on the income which the widow receives from England from the trustees of the will or the trustees of the settlement a tax which is described as an income tax. In these circumstances, she has claimed that she is entitled to have that tax, which is imposed in Kenya, paid by the trustees of the will out of the income of the residuary estate, and that she is not herself, therefore, liable to bear that tax which is imposed on her, because she is residing in Kenya. On the other hand, the persons who are interested in the surplus income contend that, when the testator referred to "all taxes (including income tax)," he intended to refer, and did in fact refer, only to the taxes (including income tax) imposed by the law of England, and that the testator's widow is not entitled to receive out of the income of the estate any additional sum in respect of the amount she has to pay for income tax under the ordinance imposing the tax in Kenya.

The point, as I have said, is a short one, but I do not think that it is altogether free from difficulty. There is, I think, one authority which, although it by no means disposes of this case, is of importance in the considering what the right answer to the question is. That is the decision of BENNETT, J., in *Re Norbury, Norbury* v. *Fahland* (1), which relates to a gift of a pecuniary legacy free of duty. The question which BENNETT, J., determined was that the words "free of duty" applied only to the duty imposed in this country, and not to duty payable in another country. The judgment is in these terms, at p. 530 ([1939] 2 All E.R. at p. 626):

> I am told that there is no direct authority upon the question raised for decision by the summons now before me. The point is not covered by the decision of the Court of Appeal in *Re Scott, Scott* v. *Scott* (2). An English testator must be presumed to know something about the duties the English law imposes both upon his estate and upon beneficiaries under his will when he dies; but not many of them, I suppose, know much if anything about death duties imposed by the laws of foreign countries. Nor, I suppose, would many of them contemplate some additional burden being imposed upon their estates by a change of residence on the part of a person to whom a legacy had been given. In the absence of authority, I hold that, where an English testator by an English will gives a pecuniary legacy "free of duty," the only duties payable out of his estate in respect of the legacy are duties imposed by English law, unless there are words in the will which make it clear that duties imposed by the law of a foreign country are to be paid thereout.

Thus, BENNETT, J., who had to decide the meaning of a gift of a pecuniary legacy "free of duty," came to the conclusion that the testator intended that only such duties as were properly payable under the law of England were to be paid, and that any duty which the legacy might attract under any foreign law was not covered by the term "free of duty."

This decision was not followed in *Re Quirk* (3), a later case before MORTON, J., In that case the headnote is as follows:

> A British subject ordinarily resident in Turkey by his will devised "free of all death duties" certain freehold land in France. On his death there was payable in respect thereof a French duty on transfer by death. No other duty in England or elsewhere was payable in respect of it, either at the date of his death or at the date of the will:—HELD, that this duty was payable out of the estate and not by the devisee.

In that case MORTON, J., found it possible to distinguish the case before him from *Norbury's* case (1), but in terms said that he agreed with the decision of BENNETT, J., but that he found in the case before him certain particular differences which, in his view, differentiated his case from *Norbury's* case (1) before BENNETT, J. On those grounds, MORTON, J., came to the conclusion that in *Quirk's* case (3) the duty imposed by the foreign law was payable out of the estate. It is quite plain on the A language used by the judge in *Quirk's* case (3) that, had there not been this very clear distinguishing factor in the case before him, he would have followed *Norbury's* case (1). In my view, the decision of MORTON, J., does not assist me at all in arriving at a decision in this case. I have mentioned it only because it has been referred to, and because B MORTON, J., did distinguish *Quirk's* case (3) from *Norbury's* case (1), although he recognised the correctness of the view of BENNETT, J., in *Norbury's* case (1).

In my judgment the decision in *Norbury's* case (1) does not cover at all, or does not cover to any great extent, the question which I have to determine. C It is different in many ways from that which BENNETT, J., had to consider, because, instead of the testator giving a pecuniary legacy free of duty, he has given an income which is to be calculated so as to provide an annual income for his wife of £2,000 free of all taxes, including income tax and duties. The testator in the case before me was an D Englishman ordinarily domiciled in this country. He described himself as a major in the Dorsetshire Regiment, and of the Sports Club, St. James Square, in the county of London, and it is not suggested that he had a domicil in any other country, or that he was other than a domiciled Englishman. When he came to provide for his widow, he was obviously E anxious that she should have an income which, together with the income she received under her marriage settlement, would give her a clear sum of £2,000 per annum, and that that yearly sum should not be reduced by the burden of taxes, including income tax and duties. That is clearly his intention, and the only question is whether that intention, as so F expressed, is sufficient to include in that which the testator's widow is entitled to have paid to her income tax which does not arise in respect of any law of England, but which is imposed by the law of Kenya, and which has become payable by reason of the fact that the testator's widow has taken up her residence in Kenya instead of in this country. G

On behalf of the testator's widow it is said that the phrase "free of all taxes (including income tax) and duties" must mean, and in terms does mean, taxes of every sort or description, wherever imposed, and by whatever law imposed. These taxes are not to fall upon the testator's widow, but are to be borne out of the income of the estate, and it is said H that one of the taxes which falls to be borne by this income is a tax which is payable in Kenya. On the other hand, I am invited to say that, when the testator, being a domiciled Englishman, provided for the payment of all taxes, including income tax and duties, he was not meaning any taxes other than such taxes, including income tax, as were imposed by the laws of England. It is said that, if the testator had said "free of all duties," then, if I followed the decision of Bennett, J., in *Norbury's* case (1), I should be bound to come to the conclusion that "duties" must mean only English duties, and that it would be inconsistent to hold that the term "duties" was not confined to taxes imposed by the laws of England, but included all taxes which were imposed in a foreign country, and which fell to be borne by the testator's widow by reason of her change of residence and by reason of the fact that she had elected to live out of this country.

I think that one passage in the judgment of Bennett, J., in *Norbury's* case (1) has some bearing on the point. Bennett, J., said, at p. 530 ([1939] 2 All E.R., at p. 626):

> Nor, I suppose, would many of them contemplate some additional burden being imposed upon their estates by a change of residence on the part of a person to whom a legacy had been given.

That seems to me to have some bearing on the present case. When the testator made his will, it is difficult to suppose that he was contemplating the possibility of his widow taking up her residence in some country other than England, and thereby incurring liability to some tax imposed by a foreign country not foreseen in any way by the testator. Still, I have to deal with what is a very wide term, because the testator's widow is to be relieved, so far as the income is concerned, of all taxes, including income tax and duties. Am I properly entitled to limit "all taxes" to taxes imposed by the laws of England, or am I to read the words "all taxes" as meaning taxes imposed anywhere by any law in any country other than England? I feel a difficulty. I think that the term "all taxes" is very wide, and *prima facie* certainly would include the tax imposed in respect of the income, wherever imposed, by any country in which the testator's widow happened to be living. However, that is not the conclusion to which I think I ought to come. I think that I should adopt the reasoning of Bennett, J., in *Norbury's* case (1), although I am not suggesting that his decision covers this case, or is itself a decision which I am in any way bound to follow. I think that, when the testator gave his widow an income and directed that the amount of it should be calculated free of payment of all taxes, including income tax and duties, he was contemplating only such taxes and duties as were properly payable from time to time under the laws of England, and he did not contemplate or intend including in the language which he used any duty which might have been imposed or to which his widow might have become liable by reason of her change of residence after his death. In the circumstances, I think that the proper answer in this case is that the income tax which the testator's widow has now become liable to pay by reason of her residence in Kenya under the law of Kenya is not a deduction which is contemplated by the testator at all, that, therefore, that tax is not included in the terms "free of all taxes (including income tax) and duties," and that, consequently, so far as that tax is concerned, it must not be borne by the testator's residuary estate.

Declaration that annual sum not to be calculated free of Kenya income tax. Costs as between solicitor and client to be paid out of the capital of the estate.

Solicitors: *Kimber Bull, Howland, Clappe & Clarke* (for the plaintiffs and for the first defendant); *Mackrell, Ward & Knight* (for the second defendant).

[*Reported by* Irene G. R. Moses, ***Barrister-at-Law.***]

Re CORBYN, MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* ATTORNEY-GENERAL AND JOHNSON.

[Chancery Division (Morton, J.), **May 6, 1941.**]

Charity—Gift for training boys for Navy and Mercantile Marine—Benefit of the community.

The testator gave all his property for the formation of a fund to be used for the sole purpose of training and educating boys selected from the training ship Exmouth as officers "in His Majesty's Navy (Britanic) of the British Mercantile Marine". He included a direction that each boy was to be given a monthly allowance of money to enable him to keep up the dignity of an officer and a gentleman. The question to be determined was whether this constituted a valid charitable bequest:—

Held: this constituted a valid charitable bequest, since it was for purposes beneficial to the community.

[**EDITORIAL NOTE.** The gift in this case would probably have been held good as an educational charity but for the clause providing a monthly allowance for the beneficiaries after the conclusion of their education. However, the judge has held that, with this addition, the gift can be held valid as being for the benefit of the community, thus bringing the case within the fourth head of the well-known definition of Lord Macnaghten in *Pemsel's* case (1).

As to Gifts for Public Purposes, see HALSBURY, Hailsham Edn., Vol. 4, pp. 122-127, paras. 161-168; and for Cases, see DIGEST, Vol. 8, pp. 257, 258, Nos. 196-199.]

Cases referred to:

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 8 Digest 241, *1*; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53; *affg.* S.C. *sub nom. R.* v. *Income Tax Comrs.* (1888), 22 Q.B.D. 296.

(2) *Re Allsop, Gell* v. *Carver* (1884), 1 T.L.R. 4; 8 Digest 257, *192*.

(3) *Re Vagliano, Vagliano* v. *Vagliano* (1905), 75 L.J. Ch. 119; 8 Digest 338, *1278*.

(4) *Re Berridge, Berridge* v. *Turner* (1890), 63 L.T. 470; 8 Digest 247, *67*.

ADJOURNED SUMMONS to determine whether the bequest made by the will of the testator, Joseph James Corbyn, for the benefit of boys of the training ship Exmouth was a valid charitable bequest. The facts are fully set out in the judgment.

George Maddocks for the plaintiffs.
Geoffrey Cross for the first defendant.
Wilfrid M. Hunt for the second defendant.

MORTON, J.: This summons raises a curious and interesting point under what appears to be a home-made will of John Charles Corbyn. The will is dated Mar. 6, 1934, and the testator made a codicil on July 28, 1937. He died on Dec. 10, 1939. The summons is taken out by the Midland Bank Executor and Trustee Co., Ltd., who proved the will on Aug. 1, 1940. The residuary estate of the testator, with regard to which this question arises, is of the value of about £6,000.

The testator by his will gives and bequeaths:

> . . . all my worldly possessions moneys furniture, hangings, table-ware, cutlery, residue of my stock-in-trade of whatever description, investments stocks and shares, bonds bank balance and any possession to which I have a claim. The proceeds of which are to be invested, and the interest of such investments to form a fund, and which fund is to be used as directed for the sole benefit and interest of the boy or boys as selected of the training ship Exmouth lying off Grays Essex and under the authority of the Metropolitan Asylums Board.

The testator was mistaken in thinking that the training ship Exmouth was under the authority of the Metropolitan Asylums Board. The evidence is that it belongs to, and is under the control of, the London County Council, and is used as a training ship for boys with a view to their taking up a maritime career. I now proceed with the reading of the will:

> The selected boy or boys to be sent to a training school or ship selected by the captain superintendent or officer in charge of the T. ship Exmouth, the boy or boys to be educated and instructed and trained to become an officer in His Majesty's Navy (Britanic) or the British mercantile marine, each individual boy's opinion and liking to be consulted into which service British Navy or British mercantile marine he desires to join. The expenses of training, educating, clothing supply of instruments and other necessaries for the efficient training, etc. to fit him or them for the career of an officer and gentleman, each boy to be given an allowance monthly of money to enable him to keep up the dignity and appearance of an officer and gentleman. Such allowance to be continued until such time as his pay is sufficient to worthily support him or until attaining the rank of lieutenant or the equivalent rank of mate (unless voluntarily relinquishing the allowance) the sooner to enable other boys the opportunity to benefit under this legacy.

Then there followed certain directions as to the executorship of the will, which I need not read, having regard to the codicil which the testator subsequently executed. He concludes his will by saying:

> I also direct £1 per week to be paid to my sister Mrs. A. Johnson 9, Ecclesbourne Road, Thornton Heath paid quarterly during her life only, at her death the money to be retained by the fund for the benefit of the selected boys of the Exmouth.

The codicil is in the following terms:

> I Joseph Charles Corbyn make this supplementary codicil to my will, I desire all my possessions money, shares, stocks, or other property of which I am possessed shall be used solely for the benefit of the boys named in my will . . .

I think that the phrase "the boys named in my will" clearly refers to the selected boy or boys mentioned by the testator in his will. Then he proceeds as follows:

> . . . and I also desire the Midland Bank Executor and Trustee Co., Ltd., to be sole executors to my will thus deleting my previous instructions that the captain of the Exmouth as my executor, deleting also benefit to any other person other than the boys stipulated in the will.

The effect of that codicil clearly is to cut out the gift in the will of a weekly sum to the testator's sister, as well as to substitute the plaintiff company as the sole executor of the will. The plaintiffs have communicated with the London County Council, and have informed the council of the terms of the will, but the council does not claim to be legally interested under the will. The defendant Mrs. Alice Beatrice Johnson is the sole next of kin of the testator and she is the sister who is mentioned in the will.

The first question raised by the summons is as follows:

> As to whether the gift and bequest by the testator's will dated Mar. 6, 1934, of a fund to be established and applied as therein directed for a boy or boys of the training ship Exmouth lying off Grays, Essex, is a valid charitable bequest or fails for uncertainty, remoteness or any other reason.

It was not contended before me that there was any uncertainty in the terms of the bequest, but clearly the trust contemplated by the testator is one which may last for an indefinite period, and it would be bad as infringing the rule against perpetuities unless it is a charitable trust. Counsel for the Attorney-General argues that it is a good charitable trust, and that it comes either under the second heading set out in the opinion of Lord Macnaghten in *Income Tax Special Purposes Comrs.* v. *Pemsel* (1)—namely, "trusts for the advancement of education"—or, alternatively, under the fourth of the headings set out by Lord Macnaghten—namely, "trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

The purpose of the trust is that the selected boy or boys shall be sent from the training ship Exmouth to another training school or ship, and they are to be educated, instructed and trained "to become an officer in His Majesty's Navy or the British mercantile marine." Each boy is to have the opportunity of choosing which Service he desires to join, and the trust provides for the expenses of education, clothing, and the supply of instruments and other necessaries for the efficient training of a boy for the career of an officer and a gentleman. It also provides that each boy is to be given a monthly allowance of money to enable him to keep up the dignity and appearance of an officer and a gentleman. I entertain no doubt that the amount of the monthly allowance there mentioned is left to the discretion of the trustee.

Had it not been for the provision in regard to the monthly allowance, I should have been disposed to hold that this was a trust for the advancement of education within the meaning of the second heading set out by Lord Macnaghten in *Pemsel's* case (1). Apart from that provision, it is a trust similar to trusts for the further education of boys on leaving school. It is true that, as counsel for the second defendant points out, it is not a trust for the general education of the boy, but for special education for a particular purpose, but I think that without the presence of the provision as to a monthly allowance I should feel disposed to hold that this was in the nature of a gift for education in a particular branch of study. Gifts for a school of art, for technical education, and for the advancement and provision of education in economic science in Great Britain have been held to be charitable in *Re Allsop, Gell* v. *Carver* (2), *Re Vagliano, Vagliano* v. *Vagliano* (3) and *Re Berridge* (4). However, I cannot arrive at the conclusion that this gift falls wholly under the second head, because I think that the purposes travel outside what would ordinarily be spoken of as educational purposes.

Another possible heading which might have been suggested is that of the "setting out of soldiers." This is one of the objects included in the preamble to the statute of Elizabeth. Counsel for the second defendant did not dispute that the Royal Navy was on the same footing as the Army for this purpose, but he pointed out that all the boys might choose to go into the mercantile marine, which would not be regarded as being within the words "setting out soldiers," and I think that that objection of his is well-founded.

I have come to the conclusion that this is a trust for purposes beneficial to the community within the fourth heading of LORD MACNAGHTEN in *Pemsel's* case (1). As regards the instructing and training of boys to become officers in the Royal Navy, I think that there can be no doubt at all that that is a purpose beneficial to the community and a charitable purpose. As regards the training of boys to become officers in the mercantile marine, it seems to me that this must also be a purpose beneficial to the community within the words used by LORD MACNAGHTEN. The mercantile marine is, of course, essential to the community in the present time of war, but at all times, unless and until this country can produce within its borders all the food and other essentials of life which it requires, the mercantile marine must be kept going, and it is of the greatest importance that boys should be suitably and efficiently trained to be officers in the mercantile marine. With regard to the provision of a monthly allowance, such as a boy may require to keep up the dignity and appearance of an officer and a gentleman, that seems to me to be a purpose which is ancillary to the main purpose. It is a provision which may meet the difficulty confronting a boy whose parents are poor. Such a boy might be prevented from following the career in question because of the lack of any means over and above his pay. It seems to me that to meet that difficulty is a purpose beneficial to the community. I do not think that the presence of this provision in the will has the effect of bringing the trust outside the bounds of a charitable trust. For these reasons, I am of opinion that the bequest in question is a valid charitable bequest.

Declaration that bequest a valid charitable bequest. Scheme to be settled. Costs of all parties as between solicitor and client to come out of the estate.

Solicitors: *Baddeley, Wardlaw & Co.* (for the plaintiffs and for the second defendant); *Treasury Solicitor* (for the first defendant).

A

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

JOSEPH CONSTANTINE STEAMSHIP LINE, LTD., *v.* IMPERIAL SMELTING CORPORATION, LTD.

THE KINGSWOOD.

[HOUSE OF LORDS (Viscount Simon, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Porter), **February 20, 21. May 9, 1941.**]

Contract—Impossibility of performance—Frustration—Charterparty—Unexplained accident to ship—Onus of proof that accident not due to negligence—Bursting of auxiliary boiler.

A ship was chartered to load a cargo, but, on the day before she should have proceeded to her berth, an explosion occurred in the auxiliary boiler, which made it impossible for her to undertake the voyage. The cause of the explosion could not be definitely ascertained, and, of three possible explanations, only one would have imported negligence on the part of the shipowners. The charterers claimed damages from the shipowners for failure to load a cargo. At the time of the accident, the ship was not an "arrived" ship, and, therefore, neither the express warranties nor the exceptions clauses in the charterparty had attached. The question thus arose whether, on a plea of frustration of the contract, the party setting up the plea had to prove that the frustration was not due to his negligence, or whether the party denying the frustration must affirmatively prove negligence or default on the part of the party setting up the plea :—

HELD : this was a case of frustration and it was upon the party denying the frustration to prove negligence or default on the part of the party setting up that plea. That negligence or default was not proved and the contract was frustrated.

Decision of the Court of Appeal ([1940] 3 All E.R. 211) *reversed.*

[**EDITORIAL NOTE.** The House of Lords have restored the decision of ATKINSON, J., in this case and established the rule that the party relying on impossibility of performance does not have to prove affirmatively that the impossibility was not due to his own default. The doctrine of frustration has been frequently discussed in recent times and its limits and extent have been sought to be defined by determining upon what legal theory the doctrine is based. It has been said that it is based upon the implication of an implied term, upon common mistake, upon exception, or upon certain matters being the basis or foundation of the contract. Those interested in this inquiry will probably find in the opinions herein many new arguments to support the theory they themselves favour, but probably no more definite solution than the statement of LORD WRIGHT that the doctrine has been somewhat empirically evolved with the object of doing what is reasonable and fair. However, the following passage in the opinion of LORD PORTER probably puts the matter, so far as it can be so put, in a nutshell : "The true principle seems to be, not that all contracts must *prima facie* be performed whether performance be possible or not, but that there are some contracts absolute in their nature where the promisor warrants the possibility of performance. These he is bound to perform in any event or to pay damages. There are other cases, however, where the promisor is only obliged to perform if he can . . . In such cases, then, he is excused unless he be in fault. Of course, if he is in fault because his deliberate act has done away with the subject-matter of the contract, and, perhaps, if he has been negligent, he cannot recover ; but *prima facie* he escapes. To make him liable his fault must be proved by the party who alleges that it destroys his excuse." In that passage one sees, perhaps, the whole history of this matter from the *dictum* in *Paradine* v. *Jane* (16) to the decision here reported, and it may well be that the whole doctrine is really only the construction of each particular contract; but the opinions delivered in this case should be most carefully considered, since they discuss the doctrine in some detail and will no doubt be used as the basis of many decisions on frustration in the course of the present emergency.

As to Frustration, see HALSBURY, Hailsham Edn., Vol. 7, pp. 212-217, para. 296; and for Cases, see DIGEST, Vol. 12, pp. 379-383, Nos. 3131-3158.]

Cases referred to:

(1) *Abrath* v. *North Eastern Ry. Co.* (1883), 11 Q.B.D. 440; 22 Digest 46, *227*; 52 L.J.Q.B. 620; 49 L.T. 618; *on appeal* (1886), 11 App. Cas. 247.

(2) *Bank Line, Ltd.* v. *Capel (Arthur) & Co.*, [1919] A.C. 435; 41 Digest 366, *2136*; 88 L.J.K.B. 211; 120 L.T. 129.

(3) *Mertens* v. *Home Freeholds Co.*, [1921] 2 K.B. 526; 12 Digest 400, *3236*; 90 L.J.K.B. 707; 125 L.T. 355.

(4) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 12 Digest 371, *3093*; 32 L.J.Q.B. 164; 8 L.T. 356.

(5) *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.*, [1935] A.C. 524; Digest Supp.; 104 L.J.P.C. 88; 153 L.T. 425.

(6) *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A.C. 497; Digest Supp.; 95 L.J.P.C. 121; 134 L.T. 737.

(7) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 41 Digest 517, *3471*; 50 L.J.Ch. 411; 44 L.T. 381; *affg.* S.C. *sub nom. Nelson* v. *Dahl* (1879), 12 Ch.D. 568.

(8) *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, *3194*; 85 L.J.K.B. 1389; *sub nom. Re F. A. Tamplin S.S. Co., Ltd., and Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; *affg.*, [1916] 1 K.B. 485; [1915] 3 K.B. 668.

(9) *Krell* v. *Henry*, [1903] 2 K.B. 740; 12 Digest 385, *3168*; 72 L.J.K.B. 794; 89 L.T. 328; *affg.* (1902), 18 T.L.R. 823.

(10) *The Glendarroch*, [1894] P. 226; 41 Digest 414, *2580*; 63 L.J.P. 89; 70 L.T. 344.

(11) *The Northumbria*, [1906] P. 292; 41 Digest 417, *2606*; 75 L.J.P. 101; 95 L.T. 618.

(12) *Jackson* v. *Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125; 12 Digest 386, *3175*; 44 L.J.C.P. 27; 31 L.T. 789; *affg.* (1873), L.R. 8 C.P. 572.

(13) *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651; 12 Digest 618, *5103*; 36 L.J.C.P. 331; 16 L.T. 669.

(14) *Wakelin* v. *London & South Western Ry. Co.* (1886), 12 App. Cas. 41; 36 Digest 77, *507*; 56 L.J.Q.B. 229; 55 L.T. 709; *affg.* (1884), [1896] 1 Q.B. 189, n.

(15) *Inchbald* v. *Western Neilgherry Coffee, Tea, and Cinchona Plantation Co., Ltd.* (1864), 17 C.B.N.S. 733; 1 Digest 542, *1952*; 34 L.J.C.P. 15; 11 L.T. 345.

(16) *Paradine* v. *Jane* (1647), Aleyn, 26; 12 Digest 371, *3088*.

(17) *Couturier* v. *Hastie* (1856), 5 H.L. Cas. 673; 12 Digest 369, *3078*; 25 L.J.Ex. 253; 28 L.T.O.S. 240; *affg.* (1853), 9 Exch. 102; *revsg.* (1852), 8 Exch. 40.

(18) *Luxor (Eastbourne), Ltd. (in liquidation)* v. *Cooper*, [1941] 1 All E.R. 33; Digest Supp.; *revsg.*, [1939] 4 All E.R. 411; *restoring* [1939] 1 All E.R. 623.

(19) *Thomas* v. *Thomas* (1855), 2 K. & J. 79; 22 Digest 162, *1385*; 25 L.J.Ch. 159.

(20) *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co., Hajee Cassim Joosub* v. *Ajum Goolam Hossen & Co.*, [1901] A.C. 362; 29 Digest 195, *1547*; 70 L.J.P.C. 34; 84 L.T. 366.

(21) *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.*, [1937] 1 K.B. 534; [1936] 3 All E.R. 696; Digest Supp.; 106 L.J.K.B. 437; 156 L.T. 4.

(22) *Blairmore Sailing Ship Co.* v. *Macredie*, [1898] A.C. 593; 12 Digest 304, *2512*; 67 L.J.P.C. 96; 79 L.T. 217.

(23) *Poussard* v. *Spiers & Pond* (1876), 1 Q.B.D. 410; 12 Digest 378, *3124*; 45 L.J.Q.B. 621; 34 L.T. 572.

(24) *Hyde* v. *Windsor* (*Dean & Canons*) (1597), Cro. Eliz. 552; 40 Digest 313, *2666*.

(25) *Hall* v. *Wright* (1859), E.B. & E. 765; 12 Digest 378, *3126*; 29 L.J.Q.B. 43; 1 L.T. 230.

(26) *Boast* v. *Firth* (1868), L.R. 4 C.P. 1; 12 Digest 377, *3116*; 38 L.J.C.P. 1; 19 L.T. 264.

(27) *Robinson* v. *Davison* (1871), L.R. 6 Exch. 269; 12 Digest 378, *3123*; 40 L.J.Ex. 172; 24 L.T. 755.

(28) *Howell* v. *Coupland* (1876), 1 Q.B.D. 258; 12 Digest 618, *5104*; 46 L.J.Q.B. 147; 33 L.T. 832; *affg.* (1874), L.R. 9 Q.B. 462.

(29) *Williams* v. *Lloyd* (1628), W.Jo. 179; 3 Digest 63, *69*.

(30) *Atkinson* v. *Ritchie* (1809), 10 East, 530; 41 Digest 464, *2955*.

(31) *Jones* v. *St. John's College, Oxford* (1870), L.R. 6 Q.B. 115; 12 Digest 383, *3161*; 40 L.J.Q.B. 80; 23 L.T. 803.

(32) *Jacobs* v. *Credit Lyonnais* (1884), 12 Q.B.D. 589; 12 Digest 392, *3201*; 53 L.J.Q.B. 156; 50 L.T. 194.

(33) *Clifford* (*Lord*) v. *Watts* (1870), L.R. 5 C.P. 577; 12 Digest 380, *3147*; 40 L.J.C.P. 36; 22 L.T. 717.

APPEAL by the shipowners from a judgment of the Court of Appeal (SIR WILFRID GREENE, M.R., SCOTT and GODDARD, L.JJ.), dated June 18, 1940, and reported [1940] 3 All E.R. 211, reversing a decision of ATKINSON, J., dated March 1, 1940, and reported [1940] 2 All E.R. 46. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

Sir Robert Aske, K.C., and *Patrick A. Devlin* (for *A. A. Mocatta* on war service) for the appellants.

G. St. Clair Pilcher, K.C., and H. G. Robertson (for *Charles Stevenson* on war service) for the respondents.

VISCOUNT SIMON, L.C.: By a charterparty, dated Aug. 5, 1936, the appellants, who were the owners of a steamship called the Kingswood, chartered the ship to agents for the respondents for a voyage with a cargo of ores and concentrates from Port Pirie in South Australia to Europe. The vessel duly sailed for Port Pirie for the purpose of loading her cargo. On Jan. 3, 1937, while she was anchored in the roads at Port Pirie, but before she became an "arrived ship," there was an explosion of extreme violence in the neighbourhood of her auxiliary boiler, which caused such damage to the steamer that she could not perform the charterparty, and the appellants gave notice to the respondents to that effect. The respondents claim damages from the appellants, alleging that the latter have broken the charterparty by failing to load a cargo. The appellants set up the defence that the contract was "frustrated" by the destructive consequences to the Kingswood of the explosion.

The dispute was referred to arbitration, and the arbitrator has made an interim award in the form of a special case. He finds that the explosion was one "of an unprecedented character," and that no probable sequence of events had been suggested as capable of having given rise to it. The energy released by the explosion was so great that the auxiliary boiler was projected forward through two water-tight bulkheads, finally piercing the collision bulkhead at the forward end and breaking the shell plates at the starboard bow. The distance travelled by the auxiliary boiler, owing to the propulsion of the explosion, before it came to rest in the fore-peak was approximately 164 ft., while two main boilers, situated aft of the auxiliary boiler, were forced backwards by the concussion 4 ft. and 5 ft. 6 ins. respectively. It is not disputed that the time needed to repair the damage and to make the Kingswood fit for her voyage was so great as to frustrate the commercial object of the adventure. The respondents, however, contend that this frustration does not suffice to excuse the appellants from having to pay damages for non-performance unless the appellants establish affirmatively that the explosion occurred without any fault on their part. The appellants, on the other hand, contend that, once the frustrating event is proved, the onus is upon the respondents to establish such default on the part of the appellants as would deprive the latter of their right to rely upon it.

After examining three principal theories which were suggested in evidence as possibly accounting for the disaster, the arbitrator declares himself unable to decide whether any one of them provided the true explanation, and he goes on to say that he is not satisfied that the direct cause of the disaster has as yet been suggested at all. His conclusion is that he was not satisfied that any of the servants of the appellants were guilty of negligence. On the other hand, neither was he satisfied that negligence on the part of the servants of the appellants did not cause or contribute to the disaster. It is this nicely balanced conclusion on the facts which provides the question of law which this House has now to decide. That question is whether, when parties have contracted in such circumstances as require a term to be implied in the contract that it shall be determined and the mutual obligations of the parties discharged by supervening destruction of the essential subject-matter of the contract, the party alleging frustration must prove affirmatively that the destruction has not been brought about by his own neglect or default.

The special case came before ATKINSON, J., who, in a most careful and elaborate judgment, in the course of which he examined a large number of authorities, decided that the present appellants succeeded. On the subject of onus of proof, ATKINSON, J., cited the well-known passage from the judgment of BOWEN, L.J., in *Abrath* v. *North Eastern Ry. Co.* (1), at p. 456, and applied it as follows ([1940] 2 All E.R. at p. 56). (I have substituted " charterers " and " shipowners " throughout as the description of the parties) :

> In such a case as this, the charterers begin by proving that the ship did not arrive within the contract time, or at all. If the case stopped there, the charterers would win. However the shipowners then prove an accident which destroyed the ship as a navigable unit. The shipowners prove an event which was the immediate, dircet and dominant cause of that destruction. If the case stops there, what is the position ? Who wins ? I do not think that the answer is a simple one, but, in my view, the onus of ultimately satisfying the tribunal that the ship was at fault rests on the charterers. Whether or not they have discharged that onus must be

> judged by applying the following principles—namely, (i) if it appears that the accident proved was of such a nature as to raise a presumption of negligence—that is, to afford some evidence of negligence—the onus is on the shipowners to destroy that presumption created by the nature of the accident, (ii) if it appears that the accident proved was of such a nature as to afford no evidence of negligence, the onus is on the charterers to prove negligence in fact, (iii) if the onus is upon the shipowners under the first principle, that onus is discharged by proving facts from which the inference that the accident was not caused by negligence is as strong—that is, equally consistent with the facts—as is the inference that it was caused by negligence.

The charterers appealed to the Court of Appeal, which reversed the decision of Atkinson, J. Scott, L.J., delivered the first judgment, with which Sir Wilfrid Greene, M.R., and Goddard, L.J., agreed. Scott, L.J., declared that this was a " very simple case," and this view is no doubt the explanation of the fact that his judgment does not provide this House with the arguments or authorities which led the Court of Appeal to their conclusion. The only help your Lordships can get is this assertion by Scott, L.J. ([1940] 2 All E.R. at p. 213) :

> A party *prima facie* guilty of a failure to perform his contract cannot escape under the plea of frustration unless he proves that the frustration occurred without his default. There is no frustration in the legal sense unless he proves affirmatively that the cause was not brought into operation by his default.

If this assertion is correct, it of course disposes of the case. The Court of Appeal refused leave to appeal, which, however, the Appeal Committee of this House thought it right to grant. The House has been assisted by a full and careful argument from counsel on each side in determining the issue.

The question to be answered is not, in my view, a very simple one, and it has not as yet, so far as I can discover, been the subject of direct decision. There is no doubt, of course, that what Lord Summer in *Bank Line, Ltd.* v. *Capel (Arthur) & Co.* (2), at p. 452, called " self-induced " frustration provides no defence. Thus, in *Mertens* v. *Home Freeholds Co.* (3), Lord Sterndale, M.R., observed, at p. 536 :

> It has never been held that a man is entitled to take advantage of circumstances as a frustration of the contract if he has brought those circumstances about himself.

He went on to illustrate his meaning by saying that in *Taylor* v. *Caldwell* (4), the defence of frustration would have failed " if the defendant had burned down the music-hall himself." Similarly, in *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (5), decided by the Judicial Committee, my noble and learned friend Lord Wright, who delivered the judgment of their Lordships, laid it down, at p. 530 :

> The essence of " frustration " is that it should not be due to the act or election of the party.

After quoting the *dictum* of Lord Sumner in *Bank Line, Ltd.* v. *Capel (Arthur) & Co.* (2), at p. 452, he went on to say, at p. 531 :

> Lord Sumner in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6) quotes from Lord Blackburn in *Dahl* v. *Nelson, Donkin & Co.* (7) who refers to a " frustration " as being a matter " caused by something for which neither party was responsible " : and again he quotes the words of Brett, J., which postulate as one of the conditions of frustration that it should be without any " default of either party." It would be easy, but is not necessary, to multiply quotations to the same effect.

All this, however, is really beside the present point, for the question raised by the arbitrator's award is not whether the defence of frustration fails if the frustration is proved to be " self-induced " (LORD SUMNER), or " due to the act or election of the party "(LORD WRIGHT), or, to use the phrase of SCOTT, L.J., " brought into operation by his default." The question here is where the onus of proof lies, i.e., whether, when a supervening event has been proved which would, apart from the defendant's " default," put an end to the contract, and when at the end of the case no inference of " default " exists and the evidence is equally consistent with either view, the defence fails because the defendant has not established affirmatively that the supervening event was not due to his default.

I may observe, in the first place, that, if this were correct, there must be many cases in which, although in truth frustration is complete and unavoidable, the defendant will be held liable because of his inability to prove a negative—in some cases, indeed, a whole series of negatives. Suppose that a vessel, while on the high seas, disappears completely during a storm. Can it be that the defence of frustration of the adventure depends upon the owner's ability to prove that all his servants on board were navigating the ship with adequate skill and that there was no "default" which brought about the catastrophe? Suppose that a vessel in convoy is torpedoed by the enemy and sinks immediately with all hands. Does the application of the doctrine require that the owners should affirmatively prove that those on board were keeping a good look-out, were obscuring lights, were steering as directed, and so forth? There is no reported case which requires us so to hold. The doctrine upon which the defence of frustration depends is nowhere so stated as to place this onus of proof on the party relying on it.

From the classic judgment of BLACKBURN, J., in *Taylor* v. *Caldwell* (4) I extract these passages, at pp. 833 and 839 respectively :

> . . . where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done ; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. [p. 833].
>
> The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance [p. 839].

It is true that the earlier of these passages states the requirement that the impossibility should have arisen " without default of the contractor," and a similar qualification is insisted upon in many other cases, *e.g.*, by VISCOUNT HALDANE in *Bank Line, Ltd.* v. *Capel* (*Arthur*) *& Co.* (2), at p. 445 :

> . . . where people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject-matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so.

However, this is not the same thing as saying that the defendant must disprove default. The qualification means, in my opinion, no more than that, unless default is proved or ought to be inferred, the defence is complete. Where the onus lies is still to be determined.

In this connection, it is well to emphasise that, when "frustration" in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically. The plaintiff sues for breach at a past date and the defendant pleads that at that date no contract existed. In this situation, the plaintiff could only succeed if it were shown that the determination of the contract were due to the defendant's "default," and it would be a strange result if the party alleging this were not the party required to prove it.

The doctrine of discharge from liability by frustration has been explained in various ways, sometimes by speaking of the disappearance of a foundation which the parties assumed to be at the basis of their contract, sometimes as deduced from a rule arising from impossibility of performance, and sometimes as flowing from the inference of an implied term. Whichever way it is put, the legal consequence is the same. The most satisfactory basis, I think, upon which the doctrine can be put is that it depends on an implied term in the contract of the parties. This was the basis adopted in *Taylor* v. *Caldwell* (4), which is practically the first case of the modern line of authorities. It is the view taken in many later cases, nowhere more clearly than in the exposition of EARL LOREBURN in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (8), at pp. 403, 404. It has the advantage of bringing out the distinction that there can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur. Discharge by supervening impossibility is not a common law rule of general application like discharge by supervening illegality. Whether the contract is terminated or not depends on its terms and surrounding circumstances in each case. Moreover, it seems to me that the explanation of supervening impossibility is at once too broad and too narrow. Some kinds of impossibility may, in some circumstances, not discharge the contract at all. On the other hand, impossibility is too stiff a test in other cases. For example, if the Coronation cases, such as *Krell* v. *Henry* (9), are to be regarded as rightly decided on their facts, the explanation of such contracts coming to an end is not to be classed as due to impossibility, for the seats let remained available, and the actions in those cases were brought for the payment or return of money. Every case in this branch of the law can be stated as turning on the question of whether, from the express terms of the particular contract, a further term should be implied which, when its conditions are fulfilled, puts an end to the contract.

If the matter is regarded in this way, the question, therefore, is as to the construction of a contract, taking into consideration its express and implied terms. The implied term in the present case may well be: "This contract is to cease to be binding if the vessel is disabled by an overpowering disaster, provided that disaster is not brought about by the default of either party." This is very similar to an express exception of "perils of the seas," as to which it is ancient law that, by an implied term of the contract, the shipowner cannot rely on the exception if its operation was brought about either (i) by negligence of his servants, or (ii) by his breach of the implied warranty of seaworthiness. If a ship sails and is never heard of again, the shipowner can claim protection for loss of the cargo under the express exception of perils of the seas. To establish that, must he go on to prove (i) that the perils were *not* caused by negligence of his servants, and (ii) were *not* caused by any unseaworthiness? I think clearly not. He proves a *prima facie* case of loss by sea perils, and then he is within the exception. If the cargo owner wants to defeat that plea, it is for him by rejoinder to allege and prove either negligence or unseaworthiness. The judgment of the Court of Appeal in *The Glendarroch* (10) is plain authority for this.

The point as to onus of proof is put very clearly in the third paragraph of Scrutton on Charterparties, 14th Edn., art. 91, p. 297 (see also Carver on Carriage by Sea, 8th Edn., § 78). The decision in *The Northumbria* (11) involves the same conclusion. Another example, from the law of bailment, confirms this view. Assume a bailment of goods to be kept in a named warehouse with an express exception of loss by fire. Proof of destruction by fire would *prima facie* excuse the bailee. The bailor could counter by alleging either (i) that the fire was caused by the negligence of the bailee, or (ii) that the goods, when burnt, were not stored in the agreed warehouse, but it would be for the bailor, not only to allege, but to prove, either (i) or (ii), though he might rely on facts proved or admitted by the bailee as establishing his proposition. Moreover, there is at any rate an inference leading to the same view in *Jackson* v. *Union Marine Insurance Co., Ltd.* (12). The plaintiff in that case had entered into a charterparty under which his vessel was to proceed from Liverpool to Newport and there take on board a cargo of iron rails for a voyage to San Francisco. The plaintiff effected an insurance on the chartered freight for the voyage with the defendants, and the question was whether, owing to the vessel going aground upon the rocks in Carnarvon Bay on her way from Liverpool to load at Newport, the adventure had been frustrated so as to involve the loss of the chartered freight by perils of the seas. Bramwell, B., in delivering the judgment of the majority of the Court of Exchequer Chamber, makes it plain, at p. 142, and again at p. 144, that the long delay due to the stranding, and the consequent impossibility of quick repair, would operate to bring the contract to an end only if the stranding arose by no default of the ship. The condition precedent was that the vessel should arrive at Newport in a reasonable time, and Bramwell, B., said, at p. 144:

> The condition precedent has not been performed, but by default of neither.

What is noticeable is that, so far as appears from the report, frustration
was treated as established without it being thought to be a necessary part
of the plaintiff's case to disprove default, while the defendants did not
choose, or were not able, to establish default themselves. The report of
A the case in the court below leads to the same inference. BRETT, J.,
delivering the judgment of the majority, uses the phrase "without
default of either party," at p. 581. The facts as to the stranding are
shortly given at p. 572, and the questions left to the jury (approved in
both courts) at p. 573, but it never occurred to anyone in either court
B to suggest that one essential question that ought to be left to the jury was :
"Have the shipowners proved that the stranding took place without
negligence or default on the part of themselves or their servants ?"

I reach the conclusion that ATKINSON, J., took the right view in this
case, and that the Court of Appeal was mistaken in holding that, once the
C frustration in fact was established and any inference of default alleged
to arise from the fact that the ship was under the control of the appellants'
servants was negatived, it lay upon the appellants to go further and satisfy
the arbitrator positively that the frustration occurred without their
default.

D For purposes of clearness, and to avoid possible misunderstanding
hereafter, I must add (though this is not necessary for the present decision)
that I do not think that the ambit of "default" as an element disabling
the plea of frustration to prevail has as yet been precisely and finally
determined. "Self-induced" frustration, as illustrated by the two
E decided cases already quoted, involves deliberate choice, and those cases
amount to saying that a man cannot ask to be excused by reason of frustration
if he has purposely so acted as to bring it about. "Default" is
a much wider term, and in many commercial cases dealing with frustration
is treated as equivalent to negligence. Yet in cases of frustration of
F another class, arising in connection with a contract for personal performance,
it has not, I think, been laid down that, if the personal incapacity
is due to want of care, the plea fails. Some day it may have to be finally
determined whether a *prima donna* is excused by complete loss of voice
from an executory contract to sing if it is proved that her condition was
G caused by her carelessness in not changing her wet clothes after being
out in the rain. The implied term in such a case may turn out to be that
the fact of supervening physical incapacity dissolves the contract without
inquiring further into its cause, provided, of course, that it has not been
deliberately induced in order to get out of the engagement. I move that
H this appeal be allowed and that the order of ATKINSON, J., be restored.
The appellants must have their costs here and in the Court of Appeal.

VISCOUNT MAUGHAM: My Lords, this is an appeal arising upon a
special case stated in an interim award to determine a question of liability
for damages under a charterparty. The claimants were the charterers of
the vessel Kingswood, and the damages claimed were for failure by the

shipowners to load a cargo at Port Pirie in South Australia. The facts of course, are to be found only in the special case, which is sufficiently stated in the opinion of Viscount Simon, L.C., and it is unnecessary for me to repeat them. It will be enough for my purpose to say that the damage to the ship was due to an explosion which occurred before the vessel became an "arrived" ship, that the explosion was one of an unprecedented character, that no probable sequence of events was suggested by either side as capable of having given rise to it, and that the arbitrator was not satisfied that it was due to the negligence of the shipowners or their servants or that the true cause of the disaster had been suggested in the course of the arbitration.

In these circumstances, the single question which arises on the appeal may be stated thus. The appellants (the shipowners) contended in answer to the respondents' (the charterers') claim for damages that the destruction of the ship as a navigable unit had resulted in the frustration of the adventure. The respondents replied that the doctrine of frustration was applicable only if performance of the contract becomes impossible without the default of either party, and that the onus, therefore, lay on the appellants to establish that they and the master and crew and the other servants of the appellants were not guilty of default causing or contributing to the disaster. The respondents contend that the findings of the special case show that this onus has not been discharged, and, accordingly, that the doctrine of frustration does not apply. Atkinson, J., in an elaborate judgment referring to all, or nearly all, the relevant cases did not agree with this contention as regards onus, and he therefore decided in favour of the appellants. The Court of Appeal took the other view, and in a very terse judgment by Scott, L.J., it was observed, ([1940] 3 All E.R. at p. 213) :

> There is no frustration in the legal sense unless he [the party *prima facie* guilty of a failure to perform his contract] proves affirmatively that the cause was not brought into operation by his default.

This was directly contrary to the opinion of the trial judge. The question is which of these two views is correct.

The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made. The doctrine in its modern form was first stated by Blackburn, J., in *Taylor* v. *Caldwell* (4). The court there was dealing with a case in which it was clear that the parties had contracted on the basis that a certain music hall would continue to exist for the purpose of giving concerts on four specified days. It had been accidentally burnt down. It was held that such a contract must be regarded as [p. 833] :

> . . . subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

This was followed four years later by *Appleby* v. *Myers* (13), another case also arising out of a fire. Blackburn, J., there amended his statement of the principle by substituting for the words "without default of the contractor " the words " without fault on either side." This amendment has ever since been accepted as correct. The principle, however is not limited to cases of contracts *de certo corpore.* It also applies to a number of cases in which the existence, or continued existence, of some specific thing is not involved, and in those cases its application is sometimes difficult : *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (8), at p. 423. The proposition stated by the Court of Appeal in a general form would appear to be applicable to all these cases. It is to be noted, however, that it is often a mere accident—for instance, the condition of the market—which decides the question as to which of two parties will desire to rely on the doctrine of frustration. Yet it follows that, if the Court of Appeal is right, there are cases in which frustration would be held not to apply if the party setting up the principle was unable to discharge the onus of proof held to be upon him, while a different result would follow if the other party was relying on frustration and he was able to discharge the onus.

The doctrine of frustration has been considered in more than fifty reported cases, the references to which will be found in the article on CONTRACTS (for which a very eminent author is responsible) in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 7, p. 215 *et seq.*, and one would have thought that there was nothing in principle left to be determined by the courts. It is a singular circumstance that there is not, so far as counsel could ascertain, a single case in which the question of onus appears to have been distinctly raised till the present case. The importance of the matter, therefore, can easily be exaggerated. However, your Lordships have now to decide the point, and it is fortunately one of considerable interest. A consideration of the reported cases, and in particular of those decided in this House, leads me to state four propositions which I think bear upon the problem. First, whether or not the doctrine rests simply on a term or condition to be implied in the contract itself, or whether it is otherwise to be explained, it is clear that it is based upon the presumed common intention of the parties. The consequences of the application of the doctrine are the same in either case. The present question can therefore be tested by asking what term or condition as to onus of proof ought to be implied here in relation to the destruction of the vessel. Secondly, if the doctrine is held applicable, the legal result is that the event in question frustrated the commercial adventure and, as was said by LORD SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6), at p. 505, " brought the contract to an end forthwith and automatically." Thirdly, to cite the words of LORD SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6), at p. 509 :

> . . . whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention or their opinions or even knowledge as to the event . . .

Its mere occurrence is taken to show that further prosecution of the adventure under the contract is impossible. Fourthly, each party is left in the position he was in when the event occurred, and legal rights already accrued under the contract are unaffected.

My Lords, I attach so much importance to these conclusions, and especially to the conclusion as to the automatic effect of the event which *prima facie* effects a frustration, that I will add a few words as to the A authority which I have quoted. *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6) was a decision of the Privy Council. The Board consisted of Viscount Dunedin, Lord Sumner and Lord Wrenbury, and Lord Sumner delivered the judgment. The time charter in the case related to a named ship, and it contained an arbitration clause. The ship was B requisitioned by the government before the agreed date of delivery, and was not released till some two years later. There followed an arbitration under the clause. An award was made by which a large sum was awarded to the shipowners as damages for the refusal of the charterers to take delivery after the ship was released. An action on the award was brought C by the shipowners in Hong Kong. The judge held that the charterers had so conducted themselves as to exclude the doctrine of frustration on which the charterers relied. This was held to be an erroneous view. The charterers had contended all along that, as the result of frustration, the whole contract had come to an end, and that the arbitrator, therefore, D had no jurisdiction. This contention prevailed. The elaborate judgment delivered by Lord Sumner was supported by a number of authorities dealing with the principle and the effect of frustration, and he referred, I think, to all the previous decisions of this House on the matter. I cannot bring myself to doubt that this high authority (though it does E not bind this House) is right, and that the reasons given for it ought to be accepted as correct.

My Lords, I think that the propositions I have derived from that case go a long way to show that the view as to onus of proof of absence of default, accepted though it was by the Court of Appeal, must be ill- F founded. Frustration operates automatically, for the good or ill of both parties. It does not resemble the case of repudiation or rescission of contract. In those cases, as was pointed out by Lord Sumner in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6), at p. 510, the party aggrieved by the conduct of the other party has an option to treat the contract as at an G end and to claim damages for its total breach. It is a right given by law in vindication of a breach. Frustration, on the other hand, is [p. 510]:

> . . . irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

H

The phrase "without fault on either side" which qualifies the doctrine of frustration is intelligible enough if it means that a party who has disabled himself from performing his promise, or who has done something to prevent the other party from performing his part of the contract, cannot set up a plea of frustration in a case in which his act or default has rendered the performance of the contract impossible. To quote again from LORD SUMNER in *Bank Line, Ltd.* v. *Capel (Arthur) & Co.* (2), at p. 452 :

> I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give A the other party the option to treat the contract as repudiated.

This passage was cited with approval by the Privy Council in *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (5), at p. 530, where the judgment of the Board was delivered by my noble and learned friend B LORD WRIGHT.

My Lords, if the principle of frustration is that the contract automatically comes to an end, irrespective of the wishes of either party, provided only that the event is "caused by something for which neither party was responsible," as was said in *Maritime National Fish, Ltd.* v. *Ocean Trawlers,* C *Ltd.* (5), at p. 531, I can see no firm ground for the proposition that the party relying on frustration in an action or in arbitration proceedings must establish affirmatively that "the cause was not brought into operation by his default," as was said by SCOTT, L.J., in the present case, ([1940] 3 All E.R. at p. 213.) Such a proposition seems to me to be D equivalent to laying down that the determination of the contract by frustration is not the automatic result of the event, but is dependent on the option of the parties, for neither party can be compelled to call evidence to prove affirmatively that the cause was not due to his default. Such a view is not, in my opinion, reconcilable with the judgment in E *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6).

Other considerations seem to me to lead to the same conclusion. Frustration may occur, as I have already mentioned, in very different circumstances. First, in cases resembling the present, where there has been the destruction of a specific thing necessary for the performance of the F contract. Secondly, where performance becomes virtually impossible owing to a change in the law. Thirdly, where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated. Fourthly, where performance becomes impossible by reason of the death or incapacity of a party whose continued good G health was essential to the carrying out of the contract. There may be other categories, and I have not forgotten the Coronation and the Review cases, of which *Krell* v. *Henry* (9) is the leading example, but they do not come within the same principle of impossibility, and I do not desire to express any opinion about them. Taking the four groups which I H have mentioned, a consideration of the many different kinds of events leading to the impossibility of performance leads, I think, to the view that it would be unreasonable, if not absurd, to lay on the person relying on frustration the onus of proof that he was not responsible for the event. In the first category, we have the case of fire. Destruction of a building by fire is generally due to someone's fault or negligence. If the owner of a large building, in which he employs many persons, sets up the doctrine of frustration on the ground of the destruction of the building by fire, it may be quite impossible for him to prove affirmatively that one of his employees who has left his service was not guilty of default. If both the plaintiff and the defendant have had duties to perform in the building under the terms of the contract, the cause of the fire may be due A to either of them. It would not be reasonable to throw this heavy onus on the party setting up frustration, since, having regard to the fourth proposition above stated, it may be mere accidental circumstances which cause one party rather than the other to rely on the doctrine. If the destruction of the thing is due to earthquake, volcanic action, flood, B storm, lightning, restraint of princes, change in the law, and so forth, it would seem to be absurd to apply the suggested doctrine of onus except in very unlikely circumstances. This shows, at any rate, that the rule stated by the Court of Appeal requires some qualification. Where the contract is for personal services, the performance of which C by one party depends on his health and life, no one has ever yet suggested that, if the person promising the personal service is alive and sets up frustration, he must show that his illness was not due to some rash act on his part, nor if the promisor is dead would it, I think, be reasonable to expect his legal personal representative to prove absence of some D default leading to the disaster.

My Lords, I also agree with the view expressed by ATKINSON, J., that the term or condition which might reasonably be implied in relation to the destruction of the vessel in this case, or in any case of true frustration, does not throw on the plaintiff or claimant the burden of proving something E which it may be impossible in practice to prove. The term or condition is not for the benefit of one party rather than the other. As I have already indicated, it is usually impossible at the date of the contract to know, if frustration of the adventure takes place, which of the two parties will desire to rely on the doctrine. In these circumstances, I F cannot see why a court should decide that the parties ought to be presumed to have intended that the ordinary rules as to onus of proof ought not to apply. After all, the question is essentially one of common sense as related to justice. Two persons have entered into a contract which cannot be performed unless a certain subject-matter continues to G exist. Ought either of the parties, after it ceases to exist, to be entitled to sue the other for damages based on his failure to perform the impossible? The law intervenes with the doctrine of frustration, and declares that the contract is at an end. Is the doctrine subject to the condition as to onus of proof which the Court of Appeal thinks should be implied? To my H mind, it is a condition which is artificial, and which may operate in some cases with great injustice, and your Lordships have not heard any sufficient reason for thinking that it forms, or ought to form, part of the rule.

For the reasons above stated, I have come to the conclusion, with all respect to the Court of Appeal, that their view is incorrect, and ought

not to prevail. Agreeing with the trial judge, I think the burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat non ei qui negat incumbit probatio.* It is an ancient rule founded on considera-
A tions of good sense, and it should not be departed from without strong reasons. The position as to proof of non-responsibility for the event in such a case as the present is not very different from the position of a plaintiff in an action for negligence where contributory negligence on his part is alleged. In such a case, the plaintiff must prove that there was
B some negligent act or omission on the part of the defendant which caused, or materially contributed to, the injury, but it is for the defendant to prove affirmatively, if he so contends, that there was contributory negligence on the part of the person injured, though here again the onus may easily be shifted: *Wakelin* v. *London & South Western Ry. Co.* (14) and
C *Abrath* v. *North Eastern Ry. Co.* (1), at p. 456. The mere circumstances of the occurrence which led to the event may be sufficient to supply *prima facie* evidence that the plaintiff is himself responsible for it, but, if that is not so, it is for the defendant to prove that which he alleges.

My Lords, on this view of the law in relation to the onus of proof in a
D case where frustration is *prima facie* established, since the voyage admittedly became impossible, we still have to determine whether the facts found in the special case in the absence of further evidence as to the cause of the explosion, are sufficient to lead to the conclusion that the appellants were to blame for the disaster. The respondents plainly were
E in no way to blame. The explosion of the auxiliary boiler took place on the appellants' ship, and no doubt it might have been due to a default on the part of the master or the crew. Here a curious circumstance must be mentioned. The appellants themselves had pleaded that the explosion arose or resulted from an act of neglect or default of the master or the
F servants in the navigation or management of the ship, or, alternatively, from a latent defect in the boiler not discoverable by due diligence. They so pleaded in the belief that proof of either of such allegations would relieve them from liability either under the Australian Carriage of Goods by Sea Act, 1924, Sched., art. IV, para. 2 (*a*), or para. 2 (*p*), of the
G Schedule to that Act, or under art. 7 of the charterparty. This view of the law was, I think, ill-founded. ATKINSON, J., so decided, and the appellants have not contended that his decision in that respect was erroneous, but it would seem clear that the appellants were endeavouring to establish affirmatively in the arbitration that their own servants were
H to blame, and it may be remarked that no weight can therefore be attached to the fact that the donkeyman was paid off in Australia three weeks after the explosion. Your Lordships have, of course, no knowledge of the course pursued as regards calling evidence in the arbitration. All this House does know is that evidence was called, and that, as the result of it, the arbitrator was not satisfied that any of the servants of the appellants were guilty of any of the negligence alleged, nor did he find

that there was any latent defect in the boiler not discoverable by due diligence, or that, if there were such a defect, it caused, or contributed to, the explosion of the boiler. It is true that he also stated that he was not satisfied that negligence on the part of the servants of the appellants did not cause or contribute to the disaster. That, in my view, amounts to a finding that notwithstanding the evidence, there was a possibility that there had been negligence or default on the part of the servants of the appellants If, however, I am right in the opinion above expressed that the onus of establishing absence of default did not rest on the appellants, the mere possibility of default on their part is not sufficient to disentitle them to rely on the principle of frustration. For these reasons, I am of opinion that the appeal should be allowed and that the order made by Atkinson, J., should be restored with costs here and below.

Lord Russell of Killowen [read by Lord Porter]: My Lords, as a general rule, impossibility of performance does not release from liability the person who has promised the performance. An exception, however, exists in the case of contracts the performance of which is necessarily dependent on the continued existence, or the continued existence in a sound condition, of a person or thing. In the case of such a contract, the cesser of that existence may release the promisor from liability on the ground of what has been termed frustration of the contract. For convenience' sake, I will refer to this cesser of existence as the destruction of the *corpus*. The question raised on this appeal is whether, on the facts as found by the arbitrator, the doctrine of frustration applies, with the result that the appellant is released from liability under the charterparty. The answer seems to me to depend upon what is the correct statement of the doctrine, i.e., upon the correct statement of what the law requires to be established in order that the promisor should be relieved from liability.

The respondents contend that it must be affirmatively established as a condition precedent to the application of the doctrine in the promisor's favour that, in respect of the destruction of the *corpus*, he is free from fault or default. In other words, he must prove that he is not responsible for that destruction. The appellants contend that, upon the destruction of the *corpus*, the doctrine applies in the promisor's favour unless it is established that he is responsible for the destruction. The rival contentions may be stated thus. (1) The appellants say: "Frustration will excuse unless it is proved to be self-induced." (2) The respondents say: "Frustration will not excuse unless it is proved not to be self-induced."

My Lords, in my opinion, the appellants' contention is correct. In coming to this conclusion, I am influenced by three considerations. First, the proving of a negative, a task always difficult and often impossible, would be a most exceptional burden to impose upon a litigant. Secondly, I know of no case of frustration in the books in which an attempt has been made, or called for, to prove the suggested negative. Thirdly, the statement of the doctrine in the authorities does not in any way compel us to adopt the contention of the respondents.

In *Taylor* v. *Caldwell* (4), BLACKBURN, J., states the doctrine in these words, at p. 839 :

> The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

No mention is there made of absence of fault or default. It is true that, in an earlier part of his judgment, he said that such a contract was to be construed as [p. 833] :

> . . . subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

However, I do not read those last five words otherwise than as a proviso or exception to the doctrine—namely, that, if the destruction of the *corpus* has been brought about by the fault or default of one of the contracting parties, that party would not be excused. In the words of LORD SUMNER in *Bank Line, Ltd.* v. *Capel* (*Arthur*) *& Co.* (2), at p. 452 :

> Reliance cannot be placed on a self-induced frustration . . .

The language of BLACKBURN, J., does not, in my opinion, justify, much less compel, the view that proof of absence of fault or default is a condition precedent to the application of the doctrine.

Whether the doctrine is applicable in favour of a contractor who is sued on the contract will depend in each case upon the ultimate result of the whole evidence, the position of the parties as regards burden of proof varying from time to time as indicated by BOWEN, L.J., in *Abrath* v. *North Eastern Ry. Co.* (1), at p. 456. The defendant will prove the destruction of the *corpus*, and, where possible, the event which brought it about. It may be that the event is of such a nature as of itself to raise a *prima facie* case of fault or default in the defendant. Unless he displaces that *prima facie* case, he will be unable to rely on the doctrine. The frustration will stand as self-induced. On the other hand, it may be that nothing is known as to what event brought about the destruction, or the known event may be of such a nature as of itself to raise no *prima facie* case of fault or default in the defendant. If the matter rests there, he will be excused from liability under the contract. The plaintiff, however, may by cross-examination, or independent evidence, or both, establish a case of fault or default in the defendant. If the matter rests there, the defendant will be unable to rely on the frustration, which will stand as self-induced. In every case, the contractor will succeed or fail in his defence of frustration according as it is or is not found as the result of the whole evidence that the frustration was self-induced.

I turn now to the arbitrator's award in the present case to ascertain what has been found as the result of the whole evidence adduced by the parties. He finds that the event which brought about the destruction of the *corpus*, namely, the explosion, was :

> . . . one of an unprecedented character, and no sequence of events which was other than improbable, was suggested as capable of having given rise to it.

No *prima facie* case of fault or default in the appellants can, in my opinion, be raised by the event which here caused the destruction of the *corpus*. The other material findings of the arbitrator are as follow. (1) He does not find that the appellants' servants were guilty of negligence as alleged, but (2) he is not satisfied that negligence on their part did not cause, or contribute to, the disaster. There is here no finding of fault or default in the appellants. In the circumstances, and as a result of the evidence and findings in this case, it appears to me impossible to say that the frustration (which is admitted) was self-induced. The frustration accordingly operates to relieve the appellants from liability under the charterparty.

My Lords, I desire to add a word in relation to the phrase "self-induced frustration." No question arises on this appeal as to the kind or degree of fault or default on the part of the contractor which will debar him from relying on the frustration. The possible varieties are infintie, and can range from the criminality of the scutttler who opens the sea-cocks and sinks his ship to the thoughtlessness of the *prima donna* who sits in a draught and loses her voice. I wish to guard against the supposition that every destruction of *corpus* for which a contractor can be said, to some extent or in some sense, to be responsible necessarily involves that the resultant frustration is self-induced within the meaning of the phrase. I would allow this appeal and restore the order of ATKINSON, J.

LORD WRIGHT: My Lords, this appeal has to deal with an award of an arbitrator in which he states for the decision of the court the question whether, on the facts as found, and on the true construction of the charterparty, the respondents in this appeal are entitled to damages from the appellants for non-performance of the charterparty. The dispute arose out of an explosion which occurred in the auxiliary boiler of the appellants' steamship Kingswood while she was anchored in the roads of Port Pirie. She had arrived there in pursuance of a charterparty dated Aug. 5., 1936, made between the appellants as owners and the respondents as charterers. Under it, she was to be ready to load a full ore cargo at Port Pirie at any customary wharf or wharves as ordered for carriage to a port or ports in England or Europe. She was expected to arrive at Port Pirie about the end of Dec., 1936, or early Jan., 1937. On Dec. 26, 1936, she anchored in the roads of Port Pirie, having sailed in ballast from Lorenzo Marques. It was agreed between the parties that the Kingswood should remain at her anchorage until Jan. 4, 1937, and then proceed to her loading berth, on arrival at which time should count. While she still lay at the anchorage, and before she became an arrived ship, the explosion occurred in the auxiliary boiler. It was of unprecedented character, in the words of the arbitrator, and took place within the boiler. The arbitrator found that it was due to the fact that there was a sudden opening of communication between the water and steam space and one or both of the combustion chambers. The energy released was such that the main boilers situated aft of the auxiliary boiler were set aft by the concussion of the explosion 4 ft. and 5 ft. 6 ins. respectively, at A which points their movement was arrested, whereas the auxiliary boiler itself was projected forward through two watertight bulkheads, finally piercing the collision bulkhead and breaking the shell plates at the starboard bow. The damage to the steamer was so serious that the appellants gave notice that they could not perform the charterparty. B The respondents then claimed damages in the arbitration.

It was admitted in the arbitration that the delay caused by the damage to the steamer was such as to frustrate the commercial object of the adventure. The appellants resisted the claim on the ground that the frustration released them from liability for further performance. The C respondents contested this defence on the ground that such a defence was only maintainable if the frustration took place without fault on the part of the appellants, and that it was for the appellants to show absence of fault. There had in fact been a Board of Trade inquiry, but the arbitrator observed that neither those who were responsible for conducting D the Board of Trade inquiry nor any of the witnesses who gave evidence before him claimed to be able to state with any certainty the causes of the disaster or the sequence of events which led up to it, and that no sequence of events which was other than improbable was suggested as capable of having given rise to it. The arbitrator stated three principal E theories of the disaster which had been put forward, but the most he could say was that, though each theory might be possibly correct, he was not satisfied by it. He summed up the final result in the words: "I am not satisfied that the true cause of the disaster has as yet been suggested." Subject to the case stated, he awarded in favour of the respondents.

F Thus, the question has come before the court whether, in the case of an admitted frustration of the adventure, without default of either party being proved, the promisors—in this case, the appellants—are liable in damages as for breach of the contract. ATKINSON, J., before whom the special case came in the King's Bench Division, decided in favour of the G appellants, on the ground that no default was established, but the casualty was unexplained, and accordingly he set aside the arbitrator's award. His decision was overruled by the Court of Appeal and the arbitrator's award was restored. In the Court of Appeal, SCOTT, L.J., in giving the leading judgment, said, at p. 213:

> H A party *prima facie* guilty of a failure to perform his contract cannot escape under the plea of frustration unless he proves that the frustration occurred without his default. There is no frustration in the legal sense *unless he proves affirmatively* that the cause was not brought into operation by his default.

The gist of the whole judgment, which is very brief, is contained in the words which I have italicised. No authority is cited.

The statement of the principle by SCOTT, L.J., is manifestly different from the statement by BLACKBURN, J., in *Taylor* v. *Caldwell* (4), at p. 839:

> The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing, shall excuse the performance.

He justified his conclusion on the ground that, by the nature of the contract, it was apparent that the parties contracted on the basis of the A continued existence of the music hall, that being essential to the performance, because it was in that building that the performance was to take place. From this the condition releasing the parties was to be implied by law. BLACKBURN, J., elsewhere in his judgment added as a sort of warning at p. 840, "without fault of either party" Clearly a party to a B contract who by his fault has caused the impossibility cannot take advantage of his own wrong. In such a case, he has prevented performance in the substantial sense, as in the illustration given by WILLES, J., in *Inchbald* v. *Western Neilgherry Coffee, Tea, & Cinchona Plantation Co., Ltd.* (15), at p. 741, of "the case in BULSTRODE where the defendant contracted to C deliver to the plaintiff a horse, but poisoned him before delivery," and was held liable in damages because he had prevented the contemplated performance.

However, BLACKBURN, J., though he qualified the rule he stated by excepting the fault or default of the contractor, or of either party, did D not add that the defendant relying on impossibility of performance must prove affirmatively that the impossibility was not due to his own default. The Court of Appeal, in so stating the rule, have made a vital change in the rule. I must consider what justification there is for that change. In order to do so, I must briefly explain my conception of E what is meant in this context by impossibility of performance, which is the phrase used by BLACKBURN, J. In more recent days, the phrase more commonly used is "frustration of the contract," or, more shortly, "frustration." "Frustration of the contract," however, is an elliptical expression. The fuller and more accurate phrase is "frustration of the F adventure or of the commercial or practical purpose of the contract." This change in language corresponds to a wider conception of impossibility, which has extended the rule beyond contracts which depend on the existence, at the relevant time, of a specific object, as in the instances given by BLACKBURN, J., to cases where the essential object does indeed exist, G but its condition has by some casualty been so changed as to be not available for purposes of the contract, either at the contract date or, if no date is fixed, within any time consistent with the commercial or practical adventure. For the purposes of the contract the object is as good as lost. Another case, often described as frustration, is where by H state interference or similar overriding intervention the performance of the contract has been interrupted for so long a time as to make it unreasonable for the parties to be required to go on with it. Yet another illustration is where the actual object still exists and is available, but the object of the contract as contemplated by both parties was its employment for a particular purpose, which has become impossible, as in the Coronation cases. In these and similar cases, where there is not, in the strict sense, impossibility by some casual happening, there has been so vital a change in the circumstances as to defeat the contract. What WILLES, J., in *Inchbald's* case (15) described as substantial performance is no longer possible. The common object of the parties is frustrated. The contract has perished *quoad* any rights or liabilities subsequent to the change. The same is true where there has been a vital change of the law, either statutory or common law, operating on the circumstances, as, for instance, where the outbreak of war destroys a contract legally made before war, but which, when war breaks out, cannot be performed without trading with the enemy. I have given this bare catalogue to illustrate the application in practice of the doctrine of frustration, in order to show how wide and various is the range of circumstances to which it may extend, and how manifold are the complications involved in the rule laid down by the Court of Appeal that there is an affirmative onus of disproving fault on the party claiming to rely on frustration.

The suggested rule seems to me to be both anomalous and unreasonable. The doctrine of frustration is intended to achieve a just and reasonable result. BLACKBURN, J., in *Taylor* v. *Caldwell* (4) starts his judgment by referring to what he regards as the general rule of English law that a party who positively contracts to do a thing must perform it or pay damages even though, by unforeseen accidents, performance has become impossible, and a *dictum*, unnecessary to the decision, of the Court of King's Bench in *Paradine* v. *Jane* (16), at p. 27, is often quoted :

> . . . when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

I am not clear what "if he may" means. It may mean "legally may," but the reference to inevitable accident seems inconsistent with reading "if he may" as reserving impossibility. However, the results of holding a man to the absolute terms of a contract would often be so unjust that from early times as the examples of BLACKBURN, J., in *Taylor* v. *Caldwell* (4) show, the courts set themselves to avoid these results wherever justice seemed to require it. The doctrine of frustration is thus, in the words of LORD SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6), at p. 510 :

> . . . a device by which the rules as to absolute contracts, are reconciled with a special exception which justice demands.

It is true that a contract absolute in terms may be absolute also in effect. The contractor, if he cannot perform, must pay damages. *Prima facie*, the actual language governs. However, a contract absolute in terms is not necessarily absolute in effect. It is in all cases a question of construction, as LORD CRANWORTH, L.C., pointed out in *Couturier* v. *Hastie* (17), at p. 681, a case where, under a contract for the sale of goods, the goods had perished at the date of the contract, both parties being then ignorant of the fact. LORD CRANWORTH, L.C., said that, looking at the contract alone, what the parties contemplated, those who bought and those who sold, was that there was an existing something to be bought and sold at the time of the contract. The buyer could not be held liable for the price, or the seller for failure to deliver. The court having thus construed the contract, both parties were held, in the event, to be discharged in law. This rule admits of clear and simple statement. This is done in the Sale of Goods Act, 1893, s. 6. Sect. 7 deals with the analogous case of an agreement to sell specific goods. If they perish, without any fault on the part of the seller or buyer, before the risk passes to the buyer, the agreement is thereby avoided. In the same way, the general law as to impossibility or frustration might be stated in positive terms. It is a question of the construction of the particular contract whether the obligation is absolute or whether it is qualified. It is thus seen that the court is not claiming to exercise a dispensing power, or to modify or alter contracts. The parties did not express the qualification because they did not think of the possibility of the occurrence, but, as LORD WATSON said in *Dahl* v. *Nelson, Donkin & Co.* (7), at p. 59 :

> . . . when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be not what the parties did intend (for they had neither thought nor intention regarding it) but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

In short, in ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended, but what, as reasonable men, they should have intended. The court personifies for this purpose the reasonable man. In the words of LORD SUMNER in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6), at p. 507 :

> An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract, which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract. If so, what the law provides must be a common relief from this common disappointment and an immediate termination of the obligations as regards future performance. This is necessary because otherwise the parties would be bound to a contract, which is one which they did not really make. If it were not so, a doctrine designed to avert unintended burdens, would operate to enable one party to profit by the event and to hold the other, if he so chose, to a new obligation.

Then LORD SUMNER added, at p. 510, that rights and wrongs which have already come into existence remain, and the contract remains to give effect to them. I have quoted these statements of law to emphasise that the court is exercising its powers, when it decides that a contract is frustrated, in order to achieve a result which is just and reasonable. It would indeed be strange if it clogged its decision with the qualification which the Court of Appeal would impose, but which seems to me, as I shall seek to explain, inconvenient and unreasonable.

It does not seem to be here necessary to embark on the inquiry whether the doctrine of impossibility or frustration should be explained as based on an implied term or exception or on common mistake or some other principle. VISCOUNT HALDANE in *Bank Line, Ltd.* v. *Capel (Arthur) & Co.* (2), at p. 445, was disposed to regard the question as one of common mistake. That may be a reasonable explanation in cases where the parties intend to contract on the basis of something which, though they do not know it, has perished by causes beyond their control, but mistake cannot, I think, be extended to cover supervening impossibility or frustration, which is a different juristic concept. The explanation which has been generally accepted in English law is that impossibility or frustration depends on the court implying a term or exception and treating that as part of the contract. I may refer, as instances of this, to the language of Blackburn, J., in *Taylor* v. *Caldwell* (4), of Earl Loreburn in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (8), at p. 403, and of Lord Sumner in *Bank Line, Ltd.* v. *Capel (Arthur) & Co.* (2) and in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6). The legislature in the Sale of Goods Act, 1893, s. 7, simply stated the principle as a matter *positivi juris*. Whatever explanation is adopted cannot affect the decision of this, or, so far as I can see, of any, case. If the question is still open in English law, I should prefer to rest the principle simply on the true meaning of the contract, as it appears to the court. The essential feature of the role is that the court construes the contract, having regard to its language, its nature and the circumstances, as meaning that it depended for its operation on the existence or occurrence of a particular object or state of things as its basis or foundation. If that is gone, the life of the contract in law goes with it, at least as regards future performance. The contract remains only to enforce accrued rights. The explanation that the ground of the rule is an implied term or exception may, however, seem to bring the rule into line with the general jurisdiction of the court to imply in a contract terms which the parties have not expressed. This jurisdiction has recently been discussed by this House in *Luxor (Eastbourne) Ltd. (in Liquidation)* v. *Cooper* (18). The parallel is, indeed, not exact, because the rule as to impossibility or frustration has peculiar and distinctive features of its own. It was, however, agreed in argument that the decision of this appeal cannot depend on what is the true explanation of the rule.

There is another aspect of the doctrine of frustration which I find it difficult to reconcile with the decision of the Court of Appeal. Frustration operates automatically. It does not depend on the choice or election of the parties to the contract. If the court holds that the meaning of the contract is such that its life is dependent on the existence, or continuance in existence, of a thing or state of things and then finds in fact that the frustrating circumstance has come to pass because the thing or state of things has not existed at the date of the contract, or has ceased to exist at some later material date, it follows by operation of law that the contract was either void to begin with or has become avoided, to use the language of the Sale of Goods Act, 1893, ss. 6, 7. This position must accordingly be distinguished from a somewhat analogous, but really quite different, position, which arises when a contract is terminated by the injured party, who rescinds it on the ground of a fundamental breach by the other party, and who further claims damages for the breach while treating it as no longer binding for the future. Such a procedure involves a choice or option by the party who rescinds. In the case of frustration, however, the contract is ended and dead simply by the frustrating event. If the parties choose to go on with it, that is in truth entering into a new contract. This is clearly stated by LORD SUMNER in the passage I have quoted above from *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6). The position of the parties ought to be determined at once, and an indefinite suspense avoided. This result, however, is just what the decision of the Court of Appeal would prevent, because, according to the decision, it cannot be known whether there has been frustration in a legal sense unless and until it is proved affirmatively by one party or the other that the frustration was not brought into operation by his default.

In the Court of Appeal, SCOTT, L.J., begins his judgment by referring to the fact that there were no exceptions in the charterparty relevant to the facts. That is true enough. The charter was wholly executory, and the exception did not operate until the vessel was placed at the charterers' disposal, which never took place. However, that is not directly material on the question of frustration if the court is satisfied that the contract, though absolute in terms, is not absolute in fact. If, in virtue of the doctrine of frustration, the court holds that the contract is dissolved, the contract as to future performance is at an end and the exceptions go with it. Frustration, if it occurs, is an overriding event. Exceptions can only be relevant at an earlier stage in the controversy, because they may be inconsistent with the idea that the contract admitted of the doctrine of frustration being applied. This aspect was discussed by LORD FINLAY, VISCOUNT HALDANE and LORD SUMNER in *Bank Line, Ltd.* v. *Capel* (*Arthur*) *& Co.* (2). Exceptions, however, may be important at a late stage as excluding fault if the frustrating event was induced by what, apart from the exceptions, would be an actionable breach of contract. I need not further discuss that aspect here. There are no exceptions to be considered. SCOTT, L.J., seems, however, to be leading up to the proposition that frustration is the only possible defence and then excluding it, not on the ground that the appellants cannot rely on their own fault if that had been proved, but on the ground that, though no fault was proved, they had not affirmatively proved absence of fault. I think that SCOTT, L.J., is basing his decision on the view that affirmative proof of absence of fault is an essential part of the case of the party relying on frustration, so that, if he fails to establish it, there is no case to go to the jury, even though in all other aspects impossibility or frustration is established, as, in the present case, it is indeed admitted.

I have tried to find authority for the rule enunciated by the Court of Appeal, but have found none either in English or in American cases or in the writings of eminent legal authors. Cases in which the courts have refused to give relief on the ground of frustration because the frustration was due to the fault of the promisor or of either party, or have considered the question, are very rare in the English reports. In the vast majority of cases, questions of responsibility do not arise. There is the observation of Lord Sumner in *Bank Line, Ltd.* v. *Capel* (*Arthur*) *& Co.* (2), at p. 452, where the facts did not raise the question :

> I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration ; indeed, such conduct might give the other party the option to treat the contract as repudiated.

In *Mertens* v. *Home Freeholds Co.* (3), a builder was sued for damages for failing to complete a building which he had agreed to erect. He pleaded by way of defence that he was discharged from further performance by a refusal of the Minister of Munitions to give a licence to proceed under the Defence of the Realm Regulations existing in 1916. The defendant had applied for a licence, but it was refused because he had intentionally (as it was found), in order to get out of a losing contract, delayed in the work. It was held by the Court of Appeal, reversing the decision of the Divisional Court, that the defence failed. Lord Sterndale, M.R., without any precise examination of the doctrine of frustration, proceeded on the broad commonsense view that a man could not take advantage, by way of defence to an action for breach of contract, of circumstances as excusing him from further performance of the contract if he had brought those circumstances about himself. Lord Sterndale, M.R., observed that, in *Taylor* v. *Caldwell* (4), if the defendant had burned down the music hall himself, he would not have been entitled to say that the subject-matter was gone and the contract frustrated. It might be added, however, that no one until now had gone so far as to decide or suggest that the defendant could not have relied on the destruction of the music hall unless he had affirmatively proved that he was not responsible for it and was not in fault. The conclusion of Lord Sterndale, M.R., followed from the facts proved, which showed actual fault on the part of the defendant.

In *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (5), a similar conclusion was reached. The case was somewhat peculiar. The defendants chartered the plaintiffs' trawler, but, it was held, on the basis that it could be used for trawling with the use of otter or similar trawling gear. That could not be done without a licence. A licence was refused, because the defendants were not permitted to obtain licences for more than three trawlers, and had applied for and obtained licences for three trawlers of their own, thus making it impossible to obtain a licence for the plaintiffs' trawler. The Privy Council held that the defendants were liable. The result is shortly stated at p. 531 :

> . . . it was the appellants' own default which frustrated the adventure : the appellants cannot rely on their own default to excuse them from liability under the contract.

That was all that was necessary for the decision of the case. No question of onus of proof was raised, because all the facts were before the court. Earlier in the judgment, the Privy Council had said at p. 530 :

> The essence of " frustration " is that it should not be due to the act or election of the party.

They had gone on to observe that Lord Sumner in *Hirji Mulji* v. *Cheong Yue S.S. Co.* (6) had quoted from *Dahl* v. *Nelson, Donkin & Co.* (7) the reference of Lord Blackburn to frustration as a matter " caused by something for which neither party was responsible," and again had quoted the words of Brett, J., which postulate that one of the conditions of frustration is that it should be " without any default of either party." But for such expressions of opinion, it would be tempting to say that the more logical view might be that there are two elements to be considered—namely, (i) impossibility or frustration under the contract and the facts, and (ii) the causation of that impossibility or frustration, whether or not it is imputable to the fault of either party. The question has generally been approached from the point of view of a party relying on frustration as an excuse for failure to perform his contract, and, obviously, if frustration means not only that performance has become impossible, but that neither party is responsible, there can be no frustration in that sense unless both conditions are fulfilled. It is that definition which English law seems to have accepted, and I think the Court of Appeal must have proceeded upon it. However, I can conceive a case in which the injured party, instead of electing to rescind on the ground of the other party's breach and claiming damages for a repudiation, might wish to rely on frustration as involving automatically the destruction of the contract and at the same time claim damages for the breach of contract which has frustrated and destroyed the contract, except so far as it remains alive to enforce rights accrued under it. So far as I know, such a case has never arisen, but, logically, it might be open, if the authorities have not excluded it. This way of looking at the matter might explain the reference to the fault of either party, instead of the fault of the party relying upon the doctrine, though " either party " may simply mean "one party or the other, if either is responsible." This view of the matter would obviously be fatal to the conclusion of the Court of Appeal, because there would then be two separate issues to be separately proved by the parties, who severally raised the one or the other. However, I do not desire to decide the question in this appeal on that debatable or untenable ground. The appeal can, I think, be decided, according to the generally accepted view that frustration involves as one of its elements absence of fault, by applying the ordinary rules as to onus of proof. If frustration is viewed, as I think it can be, as analogous to an exception, since it is generally relied upon as a defence to a claim for failure to perform a contract, the same rule will properly be applied to it as to the ordinary type of exceptions. The defence may be rebutted by proof of fault, but the onus of proving fault will rest on the plaintiff. This is merely to apply the familiar rule which is applied, for instance, where a carrier by sea relies on the exception of perils of the seas. If the goods owner then desires to rebut that *prima facie* defence on the ground of negligence or other fault on the part of the shipowner, it rests on the goods owner to establish the negligence or fault. Thus, on the view most favourable to the conclusion of the Court of Appeal, I still reject it. In addition, the ordinary rule is that a man is not held guilty of fault unless fault is established and found by the court. This rule, which is sometimes described as the presumption of innocence, is no doubt peculiarly important in criminal cases or matters, but it is also true in civil disputes. Thus, it was said in *Thomas* v. *Thomas* (19), by WOOD, V.-C., at p 83 :

> . . . possession is never considered adverse if it can be referred to a legal title.

I need not multiply citations for a principle familiar to lawyers. There is, for example, no presumption of fraud. It must be alleged and proved. So also of other wrongful acts or breaches of contract. If it is necessary, in order to defend a claim, to prove that it was a case of *felo de se*, and not merely innocent suicide while of unsound mind, the full fact must be affirmatively proved. An illustration perhaps more germane is afforded by the rules as to the onus of proof in cases of unseaworthiness. If at the end of the case it is not ascertainable on the evidence that the real cause of the loss was unseaworthiness, the defence must fail. The maxim *respice finem* applies, though there may be provisional presumptions, shifting the onus of proof from time to time during the progress of the case. This is well-illustrated in *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (20), an action on a marine insurance policy for the loss of a ship which had sunk through causes not explained. The defence was that the ship was unseaworthy. The underwriters showed facts which raised a presumption in favour of unseaworthiness, and shifted at that stage the onus of proof, but at the end the court held that the real cause of the loss was unknown, that unseaworthiness was not proved, and that the defence failed. In the same way, if negligence is alleged to override the defence of excepted perils, it must be alleged and proved affirmatively. If the matter is left in doubt when all the evidence has been heard, the party who takes upon himself to affirm fault must fail. If what SCOTT, L.J., meant was that the failure to tender the Kingswood to the charterers in time for the agreed adventure was such a fundamental breach that it could only be excused by affirmative proof of absence of fault, I cannot agree with him.

It is clear that the rule which the Court of Appeal laid down would in many cases work serious injustice and nullify the beneficial operation of the doctrine of frustration which has been somewhat empirically evolved with the object of doing what is reasonable and fair, as I have already explained. That the rule adopted by the Court of Appeal is inconvenient seems to me to be obvious. It is true that in many cases of frustration there is little or no room for human activity. As instances, I might mention earthquakes and unusual floods. In other cases, there is little room for intervention by the parties, such as in case of governmental requisition, or the refusal of a licence. It cannot be, however, that in any of these cases the party claiming that the contract is frustrated has to prove affirmatively that he has not caused or induced the frustration, and, where natural forces have operated, there may still be room for inquiry. If a ship, however, is lost with all hands in a cyclone, must the shipowners establish affirmatively that the master did not receive or ignored warnings of the danger area? There may be many maritime losses in which evidence as to how they happened is impossible. If a ship is torpedoed with all hands, must the shipowner prove affirmatively absence of fault, such as that a light was not shown on the ship, or that the ship obeyed the convoy regulations? In any case of unexplained sinking, it may be impossible to exclude the possibility of fault on the part of the owner, as in *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (20), but indeed the present is a sufficiently good illustration of an unprecedented and unexplained casualty where the real cause cannot be ascertained even after prolonged and exhaustive inquiry.

On the ruling of the Court of Appeal, the shipowner has placed upon him the unusual task of proving a negative. It is sought to say that the rule is not anomalous because of some other cases in which a party is required to prove a negative, but what are cited as parallels are so different and are so few in number as to emphasise the general rule. Thus the law as to the liability of a bailee depends on the special obligation which the law has imposed on him from ancient times. It has recently been discussed by the Court of Appeal in *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (21). If the bailee fails duly to redeliver the goods, he must, in the absence of exceptions, show that he has taken reasonable care in keeping them. Similarly the liability of a common carrier depends, according to the old law, on the custom of the realm, like that of the innkeeper. Under this special rule, a carrier is an insurer who is absolutely liable for the safe carriage of the goods unless he can explain the loss as due to an act of God, the King's enemies, or inherent vice. In modern times, the practice of having special contracts has been superimposed on the custom of the realm. These contracts contain exceptions. If the carrier pleads an exception, the goods owner may counter by pleading the fault of the carrier, but the onus of proving that, as also of proving an allegation of unseaworthiness, is, as I have already explained, on the goods owner who makes it. The provisions of the Merchant Shipping Act, 1894, particularly sects. 502 and 503, which concede to a shipowner the right by appropriate proceedings to limit the damages for which he is otherwise responsible under the contract to goods owners or passengers, require as a condition of this privilege that he should show that the casualty happened without his actual fault or privity. All these and similar cases are obviously different and depend on special contracts or statutes. They do not give any support for the rule adopted by the Court of Appeal.

The Court of Appeal do not define what in this context is the meaning of fault or default. In the Sale of Goods Act, 1893, the word "fault" as used in sects. 6 and 7 is defined as meaning "wrongful act or default." That is not perhaps very helpful, but in *Blairmore Sailing Ship Co.* v. *Macredie* (22) Lord Watson observed, at p. 607:

> The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil.

In the passages cited above from *Inchbald's* case (15) at p. 741, WILLES, J., gave as an instance of a party preventing performance the case of a man poisoning before delivery a horse which he had promised to deliver. LORD SUMNER, in speaking of a self-induced frustration, has clearly in mind positive acts against the faith of the contract which amount to a repudiation and would justify rescission. This test would apply to *Mertens* v. *Home Freeholds Co.* (3) and to *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (5). On the other hand, mere negligence seems never to have been suggested as sufficient to constitute fault in this connection. In *Taylor* v. *Caldwell* (4), where the fire was described as accidental, no one suggested an inquiry whether any servant of the defendant had negligently caused the fire, and in the cases of personal incapacity defeating a contract for personal service, like *Poussard* v. *Spiers & Pond* (23), no investigation seems ever to have been suggested whether the party claiming to be excused was careful of his or her health. Even there, however, a case of gross delinquency might perhaps be construed as amounting to a repudiation of the obligations of the contract. I do not here think it necessary to attempt the definition. This difficulty or absence of definition makes the rule enunciated by the Court of Appeal even more open to objection. In my opinion, this is a case in which it is found that there has been an unexplained casualty frustrating the contract. The real cause cannot be ascertained. No fault is shown against the appellants. I think that they are entitled to rely on the frustration as a defence to the claim. The judgment of the Court of Appeal should, in my opinion, be set aside, and that of ATKINSON, J., restored.

LORD PORTER: My Lords, the material facts in the present case can be stated in a very short compass. It appears that the appellants chartered their vessel the Kingswood to the respondents to carry a cargo from Port Pirie in South Australia to a British port. On Jan. 3, a few days after her arrival off Port Pirie, but before she became an arrived ship, a violent and unexplained explosion took place on board. The immediate cause was a sudden opening of communication between the water and steam spaces in the donkey boiler, with the result that that boiler was blown some 164 ft. forward through three bulkheads and the main boiler which faced it was set back some 4 ft. or 5 ft. What caused the sudden opening was, however, a matter of speculation. Corrosion of the stay tubes, negligence in allowing the water in the boiler to get too low, and an initial explosion weakening the tubes were all suggested, but no satisfactory explanation was given. It was admitted, however, that the damage caused to the steamer by the explosion was such as to frustrate the commercial object of the adventure.

In these circumstances, the shipowners claimed that they were absolved from all further liability. The charterers, however, maintained that there had been a breach of contract for which the shipowners were liable in damages. The dispute was referred to the arbitration of a commercial lawyer, who issued an interim award in the form of a special case. His findings are set out in cll. 10, 11 and 12 of the case, which are as follows :

> 10. (1) I am not satisfied that the condition of the tubes contributed in anyway to the disaster. On the other hand, I consider this theory to be possibly correct, and, accordingly, am not satisfied that the corroded condition of the tubes did not contribute to the disaster. (2) I am not satisfied that any of the servants of the respondents were guilty of any of the negligence alleged. On the other hand, I consider the theory to be possibly correct, and, accordingly, I am not satisfied that negligence on the part of servants of the respondents did not cause or contribute to the disaster. (3) I consider that this theory is the least probable of the three. I cannot, however, say that it is impossible. If there was in fact such an initial explosion, it is impossible to say whether or not the condition of the tubes contributed to the extent of the disaster.
>
> 11. I am not satisfied that the true cause of the disaster has as yet been suggested.
>
> 12. I am unable to find, either that there was any latent defect in the boiler not discoverable by due diligence, or that, if there were such defect, it caused or contributed to the disaster. No defect was suggested except the thinness of the stay tubes, and this, though examination was at all material times impracticable, was capable of being inferred, and was in fact inferred, from the leakages which had taken place.

The result of his finding is to leave it in doubt whether or not the shipowners were guilty of negligence. In this state of facts, he made an award holding that the shipowners were liable to the charterers in damages, and an alternative award absolving them from liability in case the court should come to a different conclusion.

The special case was set down for hearing before ATKINSON, J., who, after reviewing the authorities, rejected the arbitrator's conclusion and upheld the alternative award. From his decision the charterers appealed to the Court of Appeal, who in a short judgment reversed the judge's decision. They thought the principle clear. In their view, at p. 213 :

> A party *prima facie* guilty of a failure to perform his contract cannot escape under the plea of frustration unless he proves that the frustration occurred without his default. There is no frustration in the legal sense unless he proves affirmatively that the cause was not brought into operation by his default.

Your Lordships have to determine whether this statement accurately expounds one limitation of the doctrine of frustration.

Frustration is the term now in common use in cases in which the performance of a contract becomes impossible because its subject-matter has ceased to be available for the purpose for which both parties intended it to be used. The destruction of the subject-matter concerned, as in *Taylor* v. *Caldwell* (4) and *Appleby* v. *Myers* (13), or its requisition, as in *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (8) and *Bank Line, Ltd.* v. *Capel (Arthur) & Co.* (2), are examples. So, indeed, are such cases as *Krell* v. *Henry* (9), where, it is true, the subject-matter of the hiring could have been used and paid for, but the underlying object for which one party had let, and another had hired, a room was that it should be used for the purpose of viewing a coronation procession, and, the procession having been abandoned, it was held that all further obligations under the contract had been determined. This extension, however, of the doctrine where the subject-matter of the contract is not itself destroyed but the underlying purpose alone has been frustrated is not here in question. The present is a simple case in which the subject-matter concerned has itself ceased to be available for performance of the contract, and in principle closely resembles the position in *Jackson* v. *Union Marine Insurance Co., Ltd.* (12), except that no question of fault there came in question. The expression itself comes, I think, from *Jackson* v. *Union Marine Insurance Co., Ltd.* (12), where BRAMWELL, B., at p. 145, speaks of "an illness which would put an end in a business sense to their business engagement and would frustrate the object of that engagement," and again, at p. 148, of "the voyage being frustrated." However, though the phrase may not have been used until that date, the principle is old. The modern doctrine may be said to begin with *Taylor* v. *Caldwell* (4), where the destruction of a music hall to be used for holding a concert was held to put an end to a contract between the parties for its use for that purpose. In that case, BLACKBURN, J., points out that, as early as the reign of Queen Elizabeth, in the case of a personal contract death put an end to the obligations of both parties: *Hyde* v. *Windsor* (*Dean and Canons*) (24). No doubt the doctrine has been extended. BRAMWELL, B., in the words quoted above, applied it to an illness sufficiently long, and the cases cited mark a further extension to meet the exigencies of a more complicated social life. However, impossibility of performance by destruction of the subject-matter of the contract, whether that subject-matter be, as it originally was, a person, or later a thing, or later still the object for which that thing was, by the intention of the parties, to be used, is the foundation upon which the doctrine depends.

The application of the doctrine, however, is limited to cases where the destruction occurs without the default of either party. This limitation is clearly expressed in the cases: *Taylor* v. *Caldwell* (4), at p. 832, *Appleby* v. *Myers* (13), at p. 659, and *Bank Line, Ltd.* v. *Capel* (*Arthur*) *& Co.* (2), *per* LORD SUMNER, at p. 452. Indeed, there is some suggestion, the correctness of which it is not necessary to determine, that even in a case of personal service the same limitation might be applicable: *per* MARTIN, B., in *Hall* v. *Wright* (25), at p. 789, and in the argument in *Boast* v. *Firth* (26), at p. 5. This limitation is admitted by both parties to exist in the present case. Their dispute is as to whether the defendant, in order to establish frustration, must prove that the subject-matter perished without his fault, or whether it is enough for him to prove that it has perished and he has not in fact been shown to be in fault. If the words "without fault on either side" be strictly interpreted, it would appear that the contract is not at an end unless neither party is in fault. If the contract is *prima facie* put an end to by impossibility of performance without further proof, and if that result is only avoided provided fault be proved in one party or the other, no difficulty arises. If the view were to prevail, however, that the party alleging frustration has to prove that neither party is in fault, he would be in considerable difficulty. Not only would he have to prove that he was not in fault himself, but he would have to establish also that his opponent was not in fault, and, if he were unable to do so, he would have failed to prove frustration.

However, I do not think the expression should be so strictly interpreted. Even in *Taylor* v. *Caldwell* (4), Blackburn, J., at p. 833, speaks of the "perishing of the thing without the fault of the contractor," and at p. 835, quoting Pothier :

> . . . the debtor *corporis certi* is freed from his obligation when the thing has perished neither by his act, nor his neglect and before he is in default. . , .

In *Robinson* v. *Davison* (27), Bramwell, B., says, at p. 277 :

> . . . incapacity either of body or mind in the performer without default on his or her part is an excuse for non-performance.

In *Howell* v. *Coupland* (28), Blackburn, J., says, at p. 465 :

> Of course if the perishing were owing to any default of the seller, that would be quite another thing.

In the same case, Quain and Archibald, JJ., at p. 467, speak of a cause over which the defendant has no control. Similar expressions can be found in the later cases, and I think that in all of them stress is laid, not upon the freedom from blame of both parties, but upon the fact that a party who has been in fault cannot rely upon frustration due to his own wrongful act. If the meaning be that impossibility excuses performance, the change of expression is comprehensible enough. It signifies only that the party in default cannot take advantage of his own wrong. It is a personal disqualification preventing him from taking advantage of a frustration which has automatically occurred, not a condition of its occurrence.

However, whether the expression " without the default of either party " or " without the default of the party alleging frustration " be used, the phrase itself contains some ambiguity. The limitation as expressed in the cases might mean either that frustration is only established provided the party relying upon it proves both the destruction of the subject-matter of the contract and that he himself is not to blame, or that he succeeds provided he establishes the destruction unless it be shown that he is in fault. Either interpretation is possible, whether one regards the principle of frustration as dependent upon the implication of a term in the contract or due to the destruction of its subject-matter. If a term is to be implied, the question is what are the exact limits of the term. If the perishing of the substratum of the contract be relied upon, it has still to be determined whether it must be established that that perishing was without fault of the parties. The words alone are inconclusive, and in themselves are insufficient to establish the case of the appellants or the respondents. Some other reason must be found for preferring the one view to the other.

Each side claimed support for its argument in the fact that in no case has the present contention been put forward, the appellants saying that cases must have occurred in which the argument could have been used, the respondents that in all the decided cases the defendants were shown or admitted to be without fault. The only two instances in which the existence of fault of the party craving the assistance of the doctrine of frustration has been directly discussed have been those in which the party relying on the doctrine deliberately brought about the state of affairs which prevented the fulfilment of his contract: *Mertens* v. *Home Freeholds Co., Ltd.* (3) and *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (5). In the former case, a builder deliberately delayed his work so as to avoid the renewal of a licence necessary for its continuation, and in the latter the owners of certain trawlers who had let one on charter applied for the renewal of licences in respect of other vessels in preference to that so chartered. In *Mertens'* case (3), LORD STERNDALE, M.R., said, at p. 536:

> . . . so far as I know, it has never been held that a man is entitled to take advantage of circumstances as a frustration of the contract if he has brought those circumstances about himself.

In *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (5), LORD WRIGHT said, at p. 530:

> The essence of "frustration" is that it should not be due to the act or election of the party.

Then he quotes from the opinion of LORD SUMNER in *Bank Line, Ltd.* v. *Capel (Arthur) & Co.* (2), at p. 452:

> I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration. . . .

I do not myself think that any guidance whereby the present difficulty can be resolved is to be obtained from these statements. Indeed, they apply only to deliberate acts, and say nothing of the onus of proof, or of the exact limits of the term to be implied.

The appellants, however, also placed reliance upon the analogy of those cases of personal obligation already referred to in which the duty to perform depended upon the continued existence of one of the parties and death supervened. In such cases, they said, it never had been necessary to prove, and would be impossible for executors to prove, that the deceased man's death was without his fault. That this view may be open to question appears from the observations of MARTIN, B., in *Hall* v. *Wright* (25), at p. 789, and, though in *Williams* v. *Lloyd* (29) the plea as reported does not include an averment that the defendant was not in fault, the case, as often happens in the early reports, is very shortly stated, and it does not appear that the pleadings are set out. Moreover, in any case, it may be doubted whether in the days of Queen Elizabeth death would have been considered as the fault of a party. It would, I think, have been regarded as an act of God. Even to-day I imagine that an accidental injury to a contractor preventing performance, though resulting from his own negligence, would be regarded as an accidental consequence, or one of the ordinary incidents of life, rather than as caused by the default of the party.

The main contention of the appellant, however, was that, in the first place, to compel a defendant to prove that he was not in fault would be to ask him to establish a negative (an onus which should not generally be placed upon a party), and that, secondly, the ground upon which a contract is held to be frustrated is the implication of a term which exempts the parties from further performance, if the subject-matter of the contract perishes. This exemption, they say, is analogous to any other exception in a charterparty, and *prima facie* frees them from liability, though they may lose this protection if proved to be in fault. Support for this argument is to be found in the judgment of the court in *Jackson* v. *Union Marine Insurance Co., Ltd.* (12), where the contract evidenced by a charterparty was held to be frustrated on the ground that it was subject to an implied term by which both parties were to be excused if, by reason of an excepted peril, it became impossible for the ship to arrive at her loading berth in time to perform the contemplated voyage. The effect of this implied term was treated as analogous to that of an express exception contained in the contract between the parties. If the charterparty contained an express exception, the carrier would, upon general principles, escape liability without proof of anything other than facts bringing the exception into operation. Thereupon the goods owner, in order to defeat the protection there *prima facie* obtained, would have to prove fault of some kind—for example, negligence or unseaworthiness—which in his submission would prevent the carrier from taking advantage of the exception. If, then, the implied term frustrating the adventure be analogous to an express term, the contract would come to an end though the shipowner relied, not upon an express, but upon an implied, term, unless the charterer proved him in fault.

The respondents sought to meet this argument by the allegation that *prima facie* all contracts must be performed, however impossible, and for this proposition quoted the well-known *dicta* in *Paradine* v. *Jane* (16) and in *Atkinson* v. *Ritchie* (30). I do not think this principle was universally applicable even when these cases were decided. Moreover, neither *Paradine* v. *Jane* (16) nor *Atkinson* v. *Ritchie* (30) was a case of impossibility and the observations in each were *obiter*.

The true principle seems to be, not that all contracts must *prima facie* be performed whether performance be possible or not, but that there are some contracts absolute in their nature where the promisor warrants the possibility of performance. These he is bound to perform in any event or to pay damages. There are other cases, however, where the promisor is only obliged to perform if he can. In a contract for personal performance where he dies, or in certain other cases where the subject-matter of the contract is destroyed, he cannot implement his promise. In such cases, then, he is excused unless he be in fault. Of course, if he is in fault because his deliberate act has done away with the subject-matter of the contract, and, perhaps if he has been negligent, he cannot recover; but *prima facie* he escapes. To make him liable his fault must be proved by the party who alleges that it destroys his excuse.

It has, I think, long been recognised that a particular contract may or may not impose an absolute undertaking on the promisor. In *Taylor* v. *Caldwell* (4), BLACKBURN, J., said, at p. 833 :

> There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, A although in consequence of unforeseen accidents the performance of his contract become unexpectedly burdensome or even impossible . . . But this rule is only applicable when the contract is positive and absolute and not subject to any condition either express or implied . . .

So, in *Howell* v. *Coupland* (28), ARCHIBALD, J., said in argument, at p. 464 :

> B No doubt, if the defendant has made such an absolute contract he must abide by it, though the performance has become impossible : *Jones* v. *St. John's College, Oxford* (31). But is this an absolute contract ?

Also BOWEN, L.J., in *Jacobs* v. *Credit Lyonnais* (32), at p. 603, and WILLES, J., in *Clifford (Lord)* v. *Watts* (33), at p. 585, expressed similar opinions.

C Where the promisor makes an absolute promise, he takes the risk of his ability to fulfil his contract, and must do so or pay damages. No question of frustration does or can arise. Whatever occurs, the promisor is bound. The very fact, however, that in certain cases impossibility of performance is an excuse shows that in those cases there is no absolute D promise. It is conditional upon something—namely, the possibility of performance. If, then, in certain contracts the promisor need only fulfil his obligations if performance be possible, and if this be such a contract, there seems no valid reason for imposing on him the obligation of proving his innocence of fault. In truth, the words "without default E on either side" are not used for the purpose of establishing what has to be proved by either party. Rather they are necessarily inserted to limit the cases to which the doctrine of frustration applies. If a party be in fault, the doctrine is not to be invoked by him. If he is not in fault, it may be. They have no bearing, however, on the onus of proof. They F qualify the doctrine. They do not impose upon the party seeking to be excused the necessity of proving want of fault either in himself or in his opponent.

I have thought it unnecessary to trouble your Lordships with a discussion of the question whether a contractor should be held liable in a G case where the impossibility on which he relies was due to his negligence only, or whether some more deliberate act is required if the plea is to be defeated. In SALMOND AND WINFIELD ON CONTRACTS, p. 313, the principle is stated thus :

> It must be understood that the foregoing rules are formulated with respect to the H case of determination by frustration without any breach of the contract on the part of either party. They are not applicable in their full extent to contracts which are put an end to by the breach of them by one of the parties, nor, therefore, to contracts whose frustration is caused by a breach of contract. If the sinking of the steamship had been due to the wilful act or negligence of the shipowners different considerations would have applied. The case would then have been governed by the rule applicable to the rescission or determination of a contract in consequence of the breach thereof and not by the rules applicable to pure frustration not due to the wrongful act of either party.

This view was accepted by counsel for the appellants for the purposes of his argument. A contractor who negligently destroys the subject-matter of the contract is not free from blame, and in some cases may not be within the exception "without default" as used in the cases, but I prefer to leave the question for determination until it comes directly in issue. For the reasons I have stated, I would allow the appeal.

Appeal allowed with costs. Order of ATKINSON, J., *restored.*

Solicitors: *Holman, Fenwick & Willan* (for the appellants); *Parker, Garrett & Co.* (for the respondents),

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re ROBB'S CONTRACT.

[CHANCERY DIVISION (Simonds, J.), **April 23, 24, May 7, 1941.**]

Revenue—Stamp duty—Voluntary conveyance—Conveyance to trustees for sale—Necessity for adjudication—Finance (1909-10) *Act*, 1910 (*c.* 8) *s.* 74 (2), (6).

The purchaser claimed that a certain instrument, dated Mar. 31, 1932, which formed part of the title deeds, should be adjudicated and stamped accordingly. The deed in question was a conveyance to trustees on trust for sale, the proceeds of which were to be held upon the trusts declared in a deed of settlement of even date to be executed immediately after the conveyance. The vendor contended that the instrument was one under which no beneficial interest passed within the meaning of the Finance (1909-10) Act, 1910, s. 74 (6) and that it did not, therefore, need adjudicating:—

HELD: (i) the contention that no beneficial interest passed under this instrument was correct. No beneficial interest could pass till the trusts were declared, and the existence of a charging clause did not justify an assertion that a beneficial interest did pass thereunder.

(ii) the instrument required to be stamped with an adjudication stamp. It operated as a voluntary disposition *inter vivos* within the meaning of sect. 74 (1), and, therefore, under subsect. (2) thereof, it had to be adjudicated. The language of that subsection was comprehensive, and instruments within subsect. (6) were not excluded.

[**EDITORIAL NOTE.** So far as is known, it has not been the practice for the Stamp Duty Office to require such instruments to be adjudicated, nor has it been the practice of conveyancers to make an objection to a deed of this nature stamped only with a 10*s*. stamp. In practice the two deeds are lodged for stamping at the same time and the *ad valorem* duty has always been charged on the trust instrument, and, in fact, in the case of settled land, it is obligatory to do so (Settled Land Act, 1925, s. 4 (3) (*e*)). In connection with this matter it has to be remembered that, up to some 15 years ago, the Stamp Duty Office were often content to stamp deeds with the stamp which the person lodging the deed asked to be put upon it. That person then rightly took the risk that the stamp might be insufficient and that he might be in difficulties if he produced it in evidence or required to sell real property included in it. During the past 15 years, however, the Stamp Duty Office have inspected every deed presented for stamping and refuse to stamp them otherwise than for the full duty they consider chargeable. It seems a little hard that, where the public submit their deeds to the appropriate authority and have them assessed to duty, they should later be liable to objection on the ground that they are insufficiently or improperly stamped. It may be questioned whether the time has not now come when deeds which have been submitted for stamping and have been stamped should be put upon the same footing as deeds bearing an adjudication stamp, at least, so far as stamp objections on an examination of title are concerned. In the circumstances of the present case, it is common knowledge that, at the present time, the Stamp Duty Office would not stamp a deed of this nature with a 10*s*. stamp unless the trust instrument was in their hands and being stamped with the appropriate *ad valorem* duty.

As to Stamps on Voluntary Dispositions *inter vivos*, see **HALSBURY**, Hailsham Edn., Vol. 28, pp. 475-477, paras. 1004-1007; and for Cases, see **DIGEST**, **Vol. 39, pp. 284, 285, Nos. 667-671.]**

Cases referred to:

(1) *Martin* v. *Inland Renenue Comrs.*, *cited* Sergeant on Stamp Duties, p. 320.

(2) *Brennan Minor's Trustees* v. *Scanlan* (1925), 41 T.L.R. 452; 28 Digest 98, *585*; 9 Tax Cas. 427.

Adjourned Summons to determine a question raised by a purchaser on a requisition. The facts are fully set out in the judgment.

J. Norman Daynes, K.C., and *C. A. J. Bonner* for the applicants.

J. Neville Gray, K.C., and *G. D. Johnston* for the respondents.

Simonds, J.: This application raises a question between vendor and purchaser which is of some importance to conveyancers—namely, whether a purchaser is entitled to require the adjudication for stamp duty of a conveyance upon trust for sale which is intended to be followed by the execution of a trust instrument in which will be declared the trusts of the proceeds of sale of the property so conveyed. The relevant deed in the present case is a conveyance dated Mar. 31, 1932, and made between G. H. Drummond as settlor of the one part and Robb and two others, as trustees, of the other part, whereby the settlor granted to the trustees the property therein described upon trust that they should sell the same and:

> . . . should hold the net proceeds of sale thereof and the net rents and profits of so much thereof as should for the time being remain unsold upon the trusts and with and subject to the powers and provisions declared and contained concerning

the same respectively by and in a deed of settlement already prepared and expressed to be made between the same parties in the same order as this deed and intended to bear even date with and to be executed immediately after this deed.

The deed contained a trustee charging clause in the usual form, and a power to raise, by mortgage of the property, any sum required as therein mentioned. This deed, which forms part of the vendor's title, is stamped A with a 10*s*. stamp only. The vendor says that this is a sufficient stamp. The purchaser claims that the deed should be adjudicated, and should be stamped accordingly. This is the short, but not easy, question which I have to decide. It is surprising that it has not been decided before now.

The Finance (1909-10) Act, 1910, s. 74 (1), provides as follows : B

> Any conveyance or transfer operating as a voluntary disposition *inter vivos* shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale . . .

Sect. 74 (2) provides as follows :

> C Notwithstanding anything in sect. 12 of the principal Act [the Stamp Act, 1891], the commissioners may be required to express their opinion under that section on any conveyance or transfer operating as a voluntary disposition *inter vivos*, and no such conveyance or transfer shall be deemed to be duly stamped unless the commissioners have expressed their opinion thereon in accordance with that section.

The questions upon which, by sect. 12 of the principal Act, the commissioners are required to express their opinion with reference to any D executed instrument are (*a*) whether it is chargeable with any duty, and (*b*), if so, with what amount of duty it is chargeable. Sect. 74 (3) is not relevant to the question I have to decide, but sect. 74 (4) provides as follows :

> E Where any instrument is chargeable with duty both as a conveyance or transfer under this section and as a settlement under the heading "Settlement" in the first schedule to the principal Act, the instrument shall be charged with duty as a conveyance or transfer under this section, but not as a settlement under the principal Act.

Sect. 74 (5) provides as follows :

> F Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other G circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred.

Finally sect. 74 (6) provides as follows :

> A conveyance or transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan or made for effectuating the appointment of a new trustee or the retirement of a trustee, whether the trust is expressed H or implied, or under which no beneficial interest passes in the property conveyed or transferred, or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, whether express or implied, or a disentailing assurance not limiting any new estate other than an estate in fee simple in the person disentailing the property, shall not be charged with duty under this section, and this subsection shall have effect notwithstanding that the circumstances exempting the conveyance or transfer from charge under this section are not set forth in the conveyance or transfer.

Two questions were argued—namely, (i) whether the conveyance of Mar. 31, 1932, is an instrument under which no beneficial interest passes in the property conveyed or transferred so as to fall within subsect. (6), and (ii) whether, assuming that it does so fall, it is nevertheless subject to the operation of subsect. (2) and must be submitted for adjudication. In my judgment, the first question must be answered in the affirmative. It was said that a beneficial interest in the property conveyed passed under the instrument, first, because it appeared upon the face of the instrument that the trustees were to hold the proceeds of sale of the property, and the rents and profits of so much thereof as should remain unsold, upon trust for the benefit of persons who could be ascertained by reference to a document already prepared and intended to be executed, and, secondly, because the instrument contained a charging clause with power to raise any necessary sums by mortgage of the property. As to the first ground, it appears to me that, unless and until the second deed is in fact executed, no beneficial interest can pass, but that there is a resulting trust in favour of the settlor, who remains master of the situation. He may change his mind if he will, and can up to the last moment refuse to execute the trust instrument. This was the view taken in *Martin* v. *Inland Revenue Comrs.* (1), and I think it is clearly right. I am not excluding the possibility of a binding trust being created in favour of third parties upon the execution of the conveyance upon trust for sale where there already exists an obligation upon the settlor to settle the property in a particular way. That was the decision in *Brennan Minor's Trustees* v. *Scanlan* (2). However, I have no such circumstances here. The second ground is also, I think, unsound. The test is whether or not a beneficial interest in the property conveyed passes under the instrument itself, and I do not think that an administration provision by virtue of which in certain events the trustees may have recourse to the property for their charges satisfies this test.

Being thus of opinion that this is an instrument which falls within subsect. (6), I have next to determine whether it is covered by subsect. (2) and must be adjudicated. In my judgment, this question also must be answered in the affirmative. The instrument is, beyond doubt, a conveyance operating as a voluntary disposition *inter vivos* within subsect. (1). The language of subsect. (2) is comprehensive :

> . . . no such conveyance or transfer shall be deemed to be duly stamped unless the commissioners have expressed their opinion thereon in accordance with that section.

The words "their opinion" mean their opinion as to whether any, and, if so, what, duty is chargeable. It was argued that subsect. (6), which provides that certain instruments shall not be charged with duty under the section, should be interpreted as meaning that such instruments are outside the section altogether, and are neither chargeable with duty nor subject to the adjudication of the commissioners in order to see whether in their opinion, they are chargeable. This argument cannot, in my judgment, prevail. In the first place, if this had been intended, nothing could have been easier than to say so. The plain language of the section, read as a whole, is against the contention. In the second place, though I hesitate to invoke what is sometimes called the policy of the Act when the language is sufficiently clear, I think that the contention of the vendor would tend to defeat the intention of the Act. The conveyancing device of a conveyance upon trust for sale with an attendant instrument of trust, the latter instrument being kept off the title, was a familiar one long before 1910. It is common ground that, under sect. 74, *ad valorem* duty has to be paid either on the conveyance or on the trust instrument. If the vendor is able to stamp the conveyance with a 10*s.* deed stamp only without adjudication, the purchaser, who cannot look at the trust instrument, has no means of knowing whether *ad valorem* duty has been paid at all. Thus the revenue loses the valuable safeguard which is afforded by the purchaser's right and duty to make requisitions in regard to stamps. It was urged that the legislature could not possibly have intended that others of the classes of instruments included in subsect. (6) should be adjudicated, and that, therefore, this cannot be its true meaning. Reference was made in particular to a conveyance or transfer made for effectuating the appointment of a new trustee. However, I find that, so far from this being a *reductio ad absurdum* of the purchaser's contention, it is the view actually taken in WILLIAMS ON VENDOR AND PURCHASER, 4th Edn., Vol. 1, p. 298, note (*f*), that such a deed does or may require adjudication. Moreover, the concluding words of the subsection point in the same direction. It is appropriate that the commissioners should, for the purpose of adjudication, be able to investigate the circumstances alleged to afford exemption from *ad valorem* duty, whether or not they are set out in the conveyance or transfer.

It is unnecessary for me to determine whether the conveyance or the trust instrument should bear the *ad valorem* stamp. The precedent books do not seem to agree, and it is immaterial so long as the one bears the *ad valorem* stamp and the other is adjudicated.

Declaration that requisition insufficiently answered. Respondents to pay costs.

Solicitors: *Evill & Coleman* (for the applicants); *Fladgate & Co.* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY *v.* BORDERS.

[HOUSE OF LORDS (Viscount Maugham, Lord Russell of Killowen, Lord Wright, Lord Romer and Lord Porter), **February 10, 13, 14, 17, May 9, 1941.**]

Misrepresentation—Fraud—Builders' brochure—Builders having pool agreement with building society—Whether co-adventurers—Liability of society.

The builders of houses on a building estate issued a brochure to an intending purchaser containing assertions, contrary to the truth, that the houses were, or would be, particularly well built, and that a leading building society was prepared to advance no less than 95 per cent. of the purchase price of the houses because they were so well built. The appellant building society in Mar., 1934, entered into a pool agreement with the builders. It was proved that the respondent had received the brochure in Feb., 1934, and subsequently purchased a house, and that the appellant society had been in correspondence with the builders since the beginning of that year and an officer of the society had seen a copy of the brochure. At the trial, it was sought to be proved that a representative of the appellant society was present at an interview with the respondent when the statements in the brochure were discussed, but the judge held that this was not proved. On appeal the Court of Appeal allowed the pleadings to be amended to include an allegation that the statements in the brochure were false to the knowledge of the appellant society and were made with the authority of the society and that such authority was to be found in, or inferred from, the correspondence:—

HELD: (i) there were no facts to support a charge of fraud against the appellant society.

(ii) the amendment of the pleadings was wrongly allowed by the Court of Appeal, as the party charged had not had the opportunity of defending himself by giving evidence specially directed to the charge made in the amended pleading.

(iii) the relationship between a builder and a building society with whom he has a pool agreement is not that of co-adventurers or principal and agent. Each is an independent person acting in his own interest, and the builder is not an agent of the building society to obtain agreements for loans.

Decision of the Court of Appeal ([1940] 1 All E.R. 302) *reversed as to the counterclaim.*

[**EDITORIAL NOTE.** Although this case has lost much of its legal interest in the course of its journey to the House of Lords, the decision here reported is still of considerable importance. As the position stood after judgment in the Court of Appeal, it seemed that building societies would require to consider very carefully what puffs were being issued by builders whom they were, in effect, financing by means of a pool agreement. The House of Lords, however, apart from deciding the issue of fraud raised on the particular facts of this case, have made observations on the general position of the societies in such a case. It is decided that the builder and the society are independent parties, and, therefore, unless the officers of the society in some way make themselves parties to any extravagant statements in a puff, the societies in general will not be in any danger of an action based on fraud. The facts of this case are very special, and, perhaps, not likely to recur, but the case has given an opportunity for the general position in this now very extensive business to be reviewed. The exercise of the discretion of the Court of Appeal in allowing an amendment to the pleadings where fraud is alleged is discussed by their Lordships, and they are all of the opinion that it was here wrongly exercised.

As to Liability in Fraud, see HALSBURY, Hailsham Edn., Vol. 23, pp. 69, 70, paras. 97, 98 ; and for Cases, see DIGEST, Vol. 35, p. 51, Nos. 457-461.]

Cases referred to :

(1) *New Brunswick & Canada Railway & Land Co.* v. *Conybeare* (1862), 9 H.L. Cas. 711 ; 35 Digest 10, *34* ; 31 L.J.Ch. 297 ; 6 L.T. 109 ; *revsg* (1860), 1 De G. F. & J. 578.

(2) *Peek* v. *Gurney* (1873), L.R. 6 H.L. 377 ; 35 Digest 21, *119* ; 43 L.J.Ch. 19 ; *affg.* (1871), L.R. 13 Eq. 79.

(3) *Arkwright* v. *Newbold* (1881), 17 Ch. D.301 ; 35 Digest 20, *114* ; 50 L.J.Ch. 372 ; 44 L.T. 393.

(4) *Derry* v. *Peek* (1889), 14 App. Cas. 337 ; 35 Digest 27, *185* ; 58 L.J.Ch. 864 ; 61 L.T. 265 ; *revsg.* (1887), 37 Ch.D. 541.

(5) *Nocton* v. *Ashburton* (*Lord*), [1914] A.C. 932 ; 35 Digest 55, *493* ; 83 L.J.Ch. 784 ; 111 L.T. 641.

(6) *Smith* v. *Chadwick* (1884), 9 App.Cas. 187 ; 35 Digest 18, *106* ; 53 L.J.Ch. 873 ; 50 L.T. 697.

(7) *Clarke* v. *Dickson* (1859), 6 C.B.N.S. 453 ; 35 Digest 18, *100* ; 28 L.J.C.P. 225,; 33 L.T.O.S. 136.

(8) *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716 ; 34 Digest 129, *991* ; 81 L.J.K.B. 1140 ; 107 L.T. 531 ; *revsg.*, [1911] 2 K.B. 489.

(9) *Whitechurch* (*George*), *Ltd.* v. *Cavanagh*, [1902] A.C. 117 ; 9 Digest 382, *2419* ; 71 L.J.K.B. 400 ; 85 L.T. 349 ; *revsg.* (1900), 16 T.L.R. 303.

(10) *With* v. *O'Flanagan*, [1936] Ch. 575 ; [1936] 1 All E.R. 727 ; Digest Supp. ; 105 L.J.Ch. 247 ; 154 L.T. 634.

Appeal by the building society, the respondents in the Court of Appeal, from a judgment of the Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.), dated Jan. 29, 1940 and reported [1940] 1 All E.R. 302, where the facts are fully set out, varying a judgment of Bennett, J., dated Feb. 13, 1939, and reported [1939] 1 All E.R. 481. This appeal is restricted to the counterclaim for fraudulent misrepresentation.

H. J. Wallington, K.C., and *Robert Fortune* for the appellants.
A. S. Comyns Carr, K.C., and *C. H. A. Lewes* for the respondent.

Viscount Maugham : My Lords, this appeal from the Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Clauson, L.JJ.) raises a question of considerable importance. By their order, dated Jan. 29, 1940, the court reversed the judgment of the trial judge (Bennett, J.) so far as the matter under appeal to your Lordships is concerned and directed a number of inquiries framed in order to determine the amount due to the respondent Mrs. Borders by way of damages for false and fraudulent representations by the appellants. By this fraud it is alleged that she was induced to purchase a house and premises from certain builders and to obtain the necessary funds from the appellants by means of a loan of £693, the loan being secured by a mortgage in favour of the appellants, dated Sept. 18, 1934. This matter was raised by a counterclaim by the respondent. The trial judge in a very careful judgment had held that the respondent had failed to prove that the appellants "were in any way responsible for the representations made to her." He had heard the witnesses and considered their evidence, and it can only be in very exceptional circumstances that the view of the trial judge in such a case ought to be overruled.

The claim of the respondent for damages for fraud had been amended in the course of a protracted trial, but the Court of Appeal in the course of the hearing permitted yet another amendment to be made, as will A appear later. This again is very unusual in a case based on fraud. The necessity for accurate pleadings in such a case was explained in forcible terms by LORD WESTBURY, L.C., in *New Brunswick & Canada Railway & Land Co.* v. *Conybeare* (1) at p. 724, and it is plain that an amendment after the witnesses have given their evidence may lead to grave injustice. B The respondent, however, had not been represented by counsel at the trial, though she was in the Court of Appeal. At the trial, she was no doubt allowed considerable latitude as regards the statement of her case, and was not held strictly bound by her pleadings, but I doubt the wisdom of the course taken by the Court of Appeal in allowing her a further C amendment of her pleadings in a case of fraud. I must make two further remarks. The first is that I do not understand the grounds for the judgment of the Court of Appeal to be those stated in the final amendment of the respondent's claim. The second is that, if, in a case based on fraud, an amendment is permitted in the Court of Appeal, the court must be D exceedingly careful not to draw inferences of dishonest conduct against a witness or a party which have not been suggested in the court below, for they might have been capable of an explanation by the witness in the box, if the amended charge of fraud had been distinctly made at the trial.

It should be explained that the action and the counterclaim covered E several important matters which were not before your Lordships on this appeal. I propose to confine my remarks to the case involved in the appeal as regards the counterclaim and to state only the facts relating to it, but it will be necessary to trouble your Lordships at some length with those facts, for the case is not free from complexity, and I am F desirous of showing why it is that I feel compelled to differ from the decision of the Court of Appeal and to accept that of BENNETT, J.

The appellants were established as long ago as 1854, and were incorporated in 1875 under the provisions of the Building Societies Act, 1874. In 1934, a firm of builders, who were carrying on business as G Morrell (Builders) Ltd. (it will be convenient to call them Morrells), were engaged in developing a building estate known as the Coneyhall Estate, West Wickham, in Kent. The houses were to be sold at prices varying from £530 to £795, and it is plain that the great majority of them were intended to be purchased with the assistance of a building society, H who would advance the greater part of the money in the usual way. Morrells in 1933 and the early part of 1934 were advertising the houses by means of a printed brochure and in other ways. The brochure consisted of 24 large pages, the first 20 of which contained very attractive pictures of the locality and of the various types of houses erected or to be erected on the estate. There were a number of puffing statements, but nothing which is relied on as a misrepresentation till the last two pages of the brochure. On those pages there are to be found the following statements:

> Incidentally, however, the fact that a leading building society makes a more generous advance over a longer period than to any other estate in Great Britain speaks volumes for the construction of the houses.
>
> All building is carried out under the strictest supervision of the local authorities, and you will be reassured to learn that, before your home has grown even so far as the damp-course—the double-course of fine slate which ensures the dryness of the house—it has been inspected no less than four times!
>
> BUILDING SOCIETY.
>
> MORRELL (Builders), LTD., are the only builders in Great Britain who can offer, by special arrangement with a leading building society, a 95 per cent. MORTGAGE advance over a period of 24 years at 5 per cent. interest.
>
> This proves without a shadow of doubt, the amazing value of Morrell homes.

At the trial, the claim for damages for fraudulent misrepresentation was based on parol statements made to the respondent on Feb. 9, 1934, at Morrells' offices at Bromley. Several persons were present, and one Feldmar, who was managing the business for Morrells and who was also a managing clerk of their solicitors at Bromley, Messrs. Trotter, Leaf and Pitcairn, made the misrepresentations knowing that they were false. Some of them were to the same effect as the extracts from the brochure. That brochure had been handed to the respondent or her husband at a previous interview at the same offices on Feb. 1, 1934, and was discussed at length on Feb. 9. It was used apparently to support the misrepresentations then made on behalf of Morrells. The respondent's case at the trial was that a representative of the appellants was present on Feb. 9, took part in the discussions, and supported Feldmar's statements. It was, however, proved to the satisfaction of the judge that no representative of the appellants was in fact present, and the counterclaim was, therefore, dismissed. It may be explained that no misrepresentation by the appellants at any time other than at the interview of Feb. 9 was alleged at the trial.

In the Court of Appeal, the claim for damages for deceit against the appellants was based on very different grounds. It was sought to show that the appellants had in some way made or affirmed fraudulent misrepresentations to the respondent in the brochure. The statements in that document above set forth no doubt amounted to an assertion, contrary to the truth, that the houses on the estate either had been, or would be, particularly well built, and also that a leading building society was prepared to advance no less than 95 per cent. of the contract price of houses built on the estate by Morrells because they were so well built.

It is here necessary to notice a point of some importance. The leading building society there referred to was clearly not the appellants, but was a Huddersfield building society with whom Morrells had an agreement. The appellants had no arrangement or agreement with Morrells till a later date. The house bought by the respondent had been built, except perhaps as to some details of completion, before Feb. 9, and had been viewed by the respondent and her husband. The statements in the brochure to the effect that the house had been well built were no doubt fraudulently untrue. The statement in that brochure as to the willingness of the leading building society to advance 95 per cent. of the contract price of each house on the estate built by Morrells may or may not have been true. No evidence was given as to the arrangements of the Huddersfield society with Morrells. It is true that a person with experience in these matters can make a probable conjecture as to the truth of the statement, but that would, of course, not be a sufficient justification for a charge of fraud.

If the respondent was to succeed in the Court of Appeal on the claim for damages, it was necessary to amend the pleadings, a course which, as already stated, was allowed by the court. The amended pleading stated that the appellants "falsely and fraudulently represented to the" respondent in the brochure a number of facts as to the respondent's house which were untrue, and that each of the representations was made by the appellants knowing that the same was false, or recklessly not caring whether the same was true or false. According to the new pleading, the representations were first made:

> . . . to the respondent by Morrells with the authority of the appellants handing the brochure to the respondent on or about Feb. 1, and were in continuous operation until after Sept. 18, 1934.

The authority is to be found in, or inferred from, a number of letters between Morrells or their solicitors and the appellants and their solicitors and between the appellants and their surveyors, Douglas Young & Co. The letters bear date from Dec. 20, 1933, to Mar. 6, 1934. No events after that date seem to be relied on. I must say at once that I do not understand how the respondent could support this pleading as it stands, and I do not know that the Court of Appeal thought otherwise. It may be pointed out that the amended pleading bases the claim for damages on an alleged authority given by the appellants to Morrells to hand the brochure to her to be found or inferred from certain letters. Your Lordships have heard these letters read more than once, and there is not a vestige of ground for thinking that Morrells had—and they clearly did not need—any such authority. The brochure was their document printed long before the appellants had appeared on the scene, and I repeat that Morrells had no agreement with the appellants till Mar. 3.

It is indeed true that the secretary of the appellants, one Clough, in the course of the negotiations with Morrells above mentioned had obtained a copy of the brochure as early as Jan. 3, 1933. He was called as a witness at the trial and was cross-examined. No suggestion was made to him that he had anything to do with the handing of the brochure to the respondent or authorised them to make any of the statements in it above set forth. Nor was it put to him that he knew that they were false. The root and essence of the matter was that the respondent's house was badly built, that (as found by the judge) the house was damp, the roof badly constructed, the roof timbers inadequate in size, the foundations insufficient, and, in a word, that the house was badly built with bad materials. The defects were concealed, and it has never been alleged that Clough knew of them at the time or had the opportunity of doing so.

My Lords, I am very anxious to do justice to the grounds on which the Court of Appeal reversed the decision of the trial judge. They are contained in the following passage from the judgment of the Court of Appeal delivered by Clauson, L.J. After referring to the circumstance that the judge had succeeded in obtaining the disclosure during the trial of certain correspondence, Clauson, L.J., said, at p. 311 :

> . . . having regard to the correspondence, we are satisfied that the judge ought to have held, and that we are bound to hold, for the defendant [the respondent] on this issue of fraud. It is true that at the interviews of Feb. 1 and Feb. 9, at which the crucial misrepresentations were made, they were made by Morrells, and not directly by the plaintiffs [the appellants], but the plaintiffs associated themselves with the fraud, and are, therefore, responsible for it, for they had knowledge of the false representations, and of their falsity, and they must have known that it was under the influence and through the inducement of the false representations that the defendant, having originally entered into the contracts with Morrells, was proceeding to complete those contracts, and, as an integral and indispensable part of that completion, accept the obligations of a borrower towards the plaintiffs. It appears to us to result quite clearly that the plaintiffs thus became liable, as participators in the fraud, for any damage which the defendant had suffered thereby.

This is further explained by the statement, at pp. 312, 313 :

> It is obvious, in our judgment, that her [the respondent's] action was induced, and that they [the Appellants] must be taken to have known that it was induced, by the misrepresentations in the brochure which the plaintiffs [the appellants] knew to be false . . . In our view, the judge ought to have proceeded to the conclusion which appears to us to follow quite plainly—namely, that on these facts the plaintiffs [the appellants] cannot escape liability for the fraud to which, by their action, they made themselves parties.

I have some difficulty in understanding the precise meaning of the repeated phrase that the appellants "associated themselves with the fraud," which must plainly refer to the fraud of Morrells. It should be noted in this connection that the only fraud suggested in the judgment was "the vital misrepresentation put forward in the paragraph quoted from the brochure"—namely, that Morrells were the only builders in Great Britain who could offer, by special arrangement with a leading building society, a 95 per cent. advance over a period of 24 years at 5 per cent. interest, and that these facts proved beyond a shadow of doubt the amazing value of Morrells' houses.

The judgment under consideration proceeds to ask what it was that induced the respondent to carry out the contracts which bound her to buy the house and to become a party to the advance of £693 to enable her to carry out those contracts. The Court of Appeal answer, at pp. 312, 313, that, in their judgment, it was obvious that her action was induced by the misrepresentations in the brochure which the appellants knew to be false. My Lords, I must say that I should give a very different answer—namely, that the respondent was clearly "induced" to carry out the contracts and to obtain the advance by the circumstance that the

contracts (if binding) compelled her so to do, and that she had apparently
no suspicion that she could get rid of her obligations to Morrells on
the ground of their fraud. What else was necessary to cause her to do
what she did? Apart, however, from this, I am unable to find any
evidence to establish that the appellants knew that the statements in
A the brochure were untrue.

My Lords, we are dealing here with a common law action of deceit,
which requires four things to be established. First, there must be a
representation of fact made by words, or, it may be, by conduct. The
phrase will include a case where the defendant has manifestly approved
B and adopted a representation made by some third person. On the
other hand, mere silence, however morally wrong, will not support an
action of deceit: *Peek* v. *Gurney* (2), at p. 390 *per* LORD CHELMSFORD,
and at p. 403, *per* LORD CAIRNS, and *Arkwright* v. *Newbold* (3), at p.
318. Secondly, the representation must be made with a knowledge
C that it is false. It must be wilfully false, or at least made in the absence
of any genuine belief that it is true: *Derry* v. *Peek* (4) and *Nocton* v.
Ashburton (Lord) (5). Thirdly, it must be made with the intention
that it should be acted upon by the plaintiff, or by a class of persons
which will include the plaintiff, in the manner which resulted in damage
D to him: *Peek* v. *Gurney* (2) and *Smith* v. *Chadwick* (6), at p. 201. If,
however, fraud be established, it is immaterial that there was no intention
to cheat or injure the person to whom the false statement was made:
Derry v. *Peek* (4), at p. 374, and *Peek* v. *Gurney* (2), at p. 409. Fourthly,
it must be proved that the plaintiff has acted upon the false statement
E and has sustained damage by so doing: *Clarke* v. *Dickson* (7). I am not,
of course, attempting to make a complete statement of the law of deceit,
but only to state the main facts which a plaintiff must establish. The
statement that the appellants associated themselves with Morrells'
fraud must be understood as meaning that all these facts have been
F proved in regard to the appellants or their agents, and, since in this
case, as the Court of Appeal states, the honesty of the directors of the
appellants is not in question, for there is no evidence that they ever
saw the brochure, the case must be rested on a fraud perpetrated by an
official or other agent of the society. A corporation, which must act
G through its agents, is as responsible as any other principal for any wrongful
act committed by an agent whilst acting within the scope of his employment,
and not the less that the wrongful act is a fraud by the agent for
his own advantage: *Lloyd* v. *Grace, Smith & Co.* (8). Whether the act is
within the scope of the agent's authority should be tested, if he has a
H permanent employment, by reference to the ordinary duties of that
employment, which he clearly cannot extend by a fraudulent act. If
it is an agency authorising a special act, the agent will not bind the
principal to an extent beyond that which is reasonably to be inferred
from the nature of that special employment and the duties incident to
it. A very striking example of a fraudulent act by an agent (the secretary)

of a company is to be found in the well-known case in this House of *Whitechurch (George), Ltd.* v. *Cavanagh* (9).

The judgment of the Court of Appeal appears to rely only on the correspondence as establishing the fact that the plaintiffs associated themselves with the fraudulent representations contained in the brochure. The parol evidence was not referred to during the hearing or in the judgment. In dealing with this correspondence, it will be remembered that the brochure was a brochure printed at a time when a Huddersfield building society was making the advances on the Coneyhall estate. No evidence was given to show that the alleged misrepresentations, in so far as they related to a society other than the appellants, were untrue at the time when the respondent was given a copy of the brochure. As already stated, the respondent's case at the trial was based on parol representations made in the presence, and with the approval, of a representative of the appellants, and that case had failed. It is true, of course, that the appellants and Morrells entered into a pooling agreement on or about Mar. 3, and that, if Morrells after that date used the brochure with its references to a leading building society as being a reference to the appellants, they would be making a false representation. It must, then, be considered whether there is any evidence in the letters to justify the conclusion that the appellants in some way either authorised such a statement or approved its use by words or conduct. The letters relied on are enumerated in the final amendment of the respondent's claim, and the last letters are dated Mar. 6, 1934.

The correspondence passing in 1933 can fairly be dealt with in the way in which the judgment of the Court of Appeal dealt with it, at p. 312 :

> In December, 1932, Morrells inquired of the plaintiffs [appellants] on what terms the plaintiffs would make 90 per cent. advances in respect of certain named building estates which were under development by Morrells. The Coneyhall Estate, of which the house now in question formed part, is not among the estates named. It appears from this letter that Morrells had a very large pool with a leading building society, and would be willing to create a similar pool with the plaintiffs. It should be explained that this refers to the device of arranging for a personalty fund to be put up as a general collateral security against loss by the building society on any individual mortgage, a device which enables the building society with a reasonable degree of safety to advance on each transaction a sum very nearly approximating to the valuation. Negotiations as to the terms on which Morrells would be prepared to give the plaintiffs the business of thus financing purchasers on Morrells' estates continued through 1933. About the end of 1933, the brochure relating to the Coneyhall Estate was in the plaintiffs' hands, as appears from a letter from them to Morrells, dated Jan. 1934. . . . . .

The plaintiffs, by a letter written by Clough, criticised some of the statements in it relating to building society advances, but did not mention or refer to the alleged misrepresentations, in particular to the passage as to the special arrangement with "a leading building society" which, it was said, enabled Morrells to offer a 95 per cent. mortgage advance at 5 per cent. interest. The letter said with regard to the brochure that there had been an opportunity of "giving some consideration to the Coneyhall Estate brochure." This letter and the subsequent letter of Jan. 9 showed clearly that the brochure would require alteration if the appellants began to make advances to purchasers of houses on this estate. The judgment of the Court of Appeal continues as follows, at p. 312:

> In the course of that month [January], the negotiations between Morrells and the plaintiffs reached the stage of the preparation of a draft agreement, and, from a letter of Jan. 12, 1934, from the plaintiffs to their surveyors, it appears that the Coneyhall Estate was one of the estates to which the arrangements were to apply. The abstract of title to that estate was sent to the plaintiffs' solicitors on Feb. 6, 1934.

It will be remembered that the respondent and her husband had the first interview with Morrells at their Bromley office. A copy of the brochure was then handed to her, as already stated. She paid a sum of £1 as:

> . . . an initial deposit for the freehold of plot No. 187, Kingsway, Coneyhall, at the price of £690 subject to contract.

There followed, as already stated (on Feb. 9), the interview between the respondent and her husband at which the misrepresentations were made by Morrells. Induced by these false and fraudulent statements, the respondent signed two printed forms of contract. The first was for the purchase for £100 of a plot of land on the estate called 187, Kingsway, and the second was for the erection by Morrells for the respondent of a dwelling-house on the plot for the sum of £595. In fact, the house was almost complete on Feb. 1. The appellants had nothing to do with these transactions. According to the finding of BENNETT, J., they had no contractual relationship with Morrells till Mar. 3, 1934, though negotiations with them had been in progress for some months.

At some date after Feb. 9 the respondent signed an application for a loan addressed to the appellants. It was forwarded to them some days later and was granted by the board on Feb. 25, after the appellants' surveyors, Douglas Young & Co., had made a written valuation of the house, putting upon it a value equal to the contract price, namely, £690. Before Mar. 2 the respondent agreed with Morrells for the latter to build a garage on the plot of land at an additional cost of £40, and on that date Messrs. Trotter, Leaf & Pitcairn, solicitors for Morrells, wrote to the appellants asking for an advance of £692 to the respondent on the footing that the total purchase price was now £730. On Mar. 3 the respondent paid Morrells the sum of £33 on account of the purchase price, and she was then given possession of the house, and she and her husband have lived there ever since. On Mar. 12, the appellants asked for and obtained spare copies of the brochure.

The respondent made complaints to Morrells as to various defects in the house, and they agreed to put these matters right. The garage was completed by June 30, and the surveyors, Douglas Young & Co., wrote on that date to the appellants that they had again inspected the house, and that, the garage being completed, £40 could be added to the value, making the total valuation £730. They also mentioned, without any details, the defects complained of, and stated that Morrells had promised to rectify them.

On July 2, 1934, Messrs. Read, Eaton & Co., the appellants' solicitors in Bradford, requested Messrs. Trotter, Leaf & Pitcairn, Morrells' solicitors in Bromley, to obtain the signature of the respondent to the mortgage of the premises by her to the appellants, and they enclosed the engrossment for that purpose. The respondent, however, refused to sign it, because the defects complained of had not been remedied, and the judge found that on Sept. 18 she had written and sent to the appellants a letter stating her reasons for not signing the mortgage. I do not think it necessary to take up your Lordships' time by a detailed statement of the subsequent events. It is sufficient to say that the respondent alleges that she executed a mortgage on the house in consideration of £693 advanced by the appellants to her at 5 per cent., repayable by subscriptions on shares in the society of £4 4*s.* per calendar month, but she alleges, and the judge held, that she executed this deed as an escrow dependent on the performance by Morrells of the promise to make good the defects in the house. Nothing turns on this, and counsel for the respondent admitted to your Lordships that the deed was now effective.

The respondent paid various sums to the appellants amounting to £121 16*s.*, but she then allowed her subscriptions to get more than three months in arrear. The appellants, after negotiations, commenced proceedings claiming possession of the premises on June 23, 1937. They produced a mortgage purporting to be executed by the respondent on Oct. 10, 1934, but the respondent denied the execution of the document produced, and the appellants failed to prove that she did execute it. The judge therefore dismissed the action for possession. As already mentioned, the issues which your Lordships are now considering were raised by a counterclaim, which was also dismissed by BENNETT, J., on the simple ground that the respondent had failed to prove that the appellants were in any way responsible for the representations made to her. It should be mentioned that the Court of Appeal pointed out that rescission was out of the question in the circumstances, and that the respondent could not, therefore, escape liability for £693 and interest, less any amounts paid by her to the appellants. She at present owns the house and premises subject to the mortgage. The inquiries directed by the Court of Appeal were designed in effect to reduce, by way of damages for deceit, the amount of her liability under the mortgage which she admits that she executed, though it has not been produced.

I must now ask the question whether the essentials of an action of deceit have been established. First, who made the representations of fact so as to bind the appellants ? The only possible agent, so far as I can see, was Clough, the secretary of the appellants. In the correspondence, I can find nothing to suggest that he ever said or did anything to make the respondent believe that the material statement in the brochure in reference to "the leading building society," or, indeed, any other statement in the brochure, was true. Secondly, there is not a word in the correspondence to show that he knew that the statement was untrue. There is no evidence that that particular statement was untrue, and nothing to show that it was repeated after Mar. 3 so as to make the statement applicable with the substitution of the appellants for the Huddersfield society. Moreover, Clough was called as a witness and cross-examined at length by the respondent. It was not suggested to him that he ever was guilty of a fraudulent statement to the respondent, and no question attributing to him a fraudulent mind was ever asked. No inference of dishonest conduct on his part ought to be drawn by an appellate court in these circumstances, and I think it only fair to Clough to say that I can see no ground for any such inference. It is a striking circumstance that there is no evidence whatever that Clough knew before the trial that the respondent had ever seen the brochure, or that she had had any verbal misrepresentations made to her on Feb. 9 or at any other date by Morrells or anyone else.

It does not seem to be possible to examine the further question whether any statement or conduct by Clough caused the respondent to execute the mortgage unless the approximate date of such statement or conduct is stated with reasonable certainty. It seems to me to be sufficient to say that there is no evidence to justify a court in holding that Clough by words or conduct ever represented to the respondent that the statements in the brochure were true. Even if the view is taken that Clough at some date after Mar. 3 ought to have required Morrells to withdraw the brochure, or to have altered it so as to make it accurate as regards the appellants, it does not seem to me that this would justify anything more than a charge of negligence against him and the appellants. It certainly would not justify an action for false representation. I express no opinion as to whether such a view would have supported an action for rescission or whether such a proceeding could possibly have benefited the respondent.

In an exhaustive and careful argument, counsel for the respondent sought to rely on some other points which had not apparently found favour with the Court of Appeal. He attempted to show that Morrells were the agents of the appellants to make the false representations on Feb. 9, or, alternatively, that Messrs. Trotter Leaf & Pitcairn, having been employed to obtain the execution of the mortgage by the respondent, became the agents of the appellants, and that the statements of their managing clerk, Feldmar, were thus binding on the appellants, or, thirdly, that there was a species of "joint adventure" between the appellants and Morrells which had the effect of making the former liable for the latter's frauds. My Lords, it is within my knowledge that some of your Lordships will deal with these points in sufficient detail, and I will content myself with saying that, like the rest of your Lordships, I am of opinion that they were not well-founded. My Lords, my conclusion is that the action for deceit must fail, and that the judgment of Bennett, J., on this matter was right on the ground which he gave. I have therefore to move your Lordships that the judgment appealed from be reversed and that the counterclaim be dismissed with costs, and that the respondent do pay the costs in the Court of Appeal and in this House.

Lord Russell of Killowen [read by Lord Wright]: My Lords, I agree with the opinion of Viscount Maugham, but, since we are differing from the Court of Appeal, I desire to add some observations of my own. This case came under our consideration in strange circumstances. The only matter argued before us was a claim by the defendant to recover damages for the alleged fraud of the plaintiffs. All other questions in dispute between the parties have been decided, and from those decisions there has been no appeal. By the counterclaim, at the trial the defendant alleged that the plaintiffs had fraudulently misled her into believing that the house, 81 Kingsway, West Wickham, was built of good materials and in an efficient and workmanlike manner, and that she had thereby been induced to accept a conveyance of that house. At the trial before Bennett, J., she alleged that she had been so fraudulently misled by oral representations (supported by the brochure) made to her on Feb. 9, 1934, by a person who was introduced to her as an agent of the plaintiffs. The judge held that it had been proved that no representative of the plaintiffs was present at the interview, and that the case for damages for fraud failed because, to quote his words, at p. 500:

> . . . she [the defendant] has failed to prove that they [the plaintiffs] were responsible for the representations made to her.

Normally, one would expect that such a finding by the judge who had seen and heard all the witnesses would have relieved the plaintiffs from all further imputations of fraud. This expectation has not been realised. On appeal, the defendant was allowed to amend her counterclaim for the purpose of raising a charge of fraud against the plaintiffs based on entirely different allegations. It was then alleged that the fraudulent representations were made, not by the plaintiffs through an agent of theirs present at the interview of Feb. 9, 1934, but in the brochure which was handed to the defendant by Morrells, the builders, on Feb. 1, 1934, with the authority of the plaintiffs. It was further stated that this alleged authority of the plaintiffs was to be found in, or inferred from, certain specified correspondence. The Court of Appeal thought that, since this correspondence had been discussed before the trial judge, they might properly allow the pleadings to be amended and the claim raised. Personally I would not have taken this course. To make a charge of fraud is a serious thing, and, before people make it, they should be clear as to the grounds and facts upon which they rely as the basis of their charge. If they fail at the trial in establishing the chosen basis of their allegation, they should not (except in very rare and special circumstances) be allowed, on appeal, to present a fresh case which has never been put to the witnesses, and upon which the A trial judge has never been called upon to express a view.

Having read and considered the correspondence relied upon as establishing the allegation that the builders were authorised by the plaintiffs to make the fraudulent misrepresentations contained in the brochure, I have failed to find any justification for the allegation. There is nothing B in the correspondence from which I can either find or infer the alleged authority. As a result, the case of fraud as pleaded in the latest edition of the counterclaim must necessarily fail.

The Court of Appeal, however, have granted relief to the defendant by way of damages for the fraud of the plaintiffs. The ground of this C decision needs to be examined. They relied upon the statement in the brochure as to a 95 per cent. mortgage advance, and treated it (I think rightly) as a representation to the effect that the house was particularly well built. They held that, on the correspondence, it was proved that the plaintiffs knew that the statement was untrue. The plaintiffs, D therefore, in allowing the defendant to borrow money from them, knowing that she had been induced to apply for the loan by the fraudulent misrepresentation of the builders "associated themselves with the fraud [of the builders] and are, therefore, responsible for it," and became liable as "participators in the fraud" of the builders for any damage E which the defendant had suffered thereby.

My Lords, even if I agreed, which I do not, that the legal proposition flowed from the stated facts, I cannot accept the facts as stated. It must be remembered that negotiations were still in progress between the builders and the plaintiffs, and that the brochure related to a time F when the plaintiffs were not making loans to purchasers from the builders. In my opinion, neither the correspondence nor the evidence establishes that Clough knew either (i) that the statement in the old brochure was untrue as to the advances made by the building society to which the old brochure in fact referred, or (ii) that the old brochure was ever G shown to the plaintiff or to any other then-intending purchaser. Indeed, there is evidence which indicates that Clough thought that, during the time when the builders and the plaintiffs were negotiating as to the pooling agreement, a revised brochure was in use, for on Mar. 12, 1934, he wrote asking for copies of the latest brochure, to which, he says, H applicants were continually making reference.

The Court of Appeal state in their judgment that the amendment which they sanctioned covered a claim based upon the lines of their judgment. I cannot agree. The two claims are essentially different. The amended claim is based on a misrepresentation authorised by the plaintiffs, *i.e.*, on a misrepresentation made by the plaintiffs through the mouth of another. The judgment of the Court of Appeal is founded upon a misrepresentation made by a third party quite independently of the plaintiffs, and on subsequent knowledge by the plaintiffs of the misrepresentation having been made. It is indeed hard on a litigant who has destroyed one basis of a charge of fraud before the trial judge to have an amended basis sanctioned on appeal, and ultimately to be held liable on a different ground altogether, but, as I have indicated, the plaintiffs in the present case cannot be held liable on either of these fresh grounds.

It remains to consider an additional argument advanced in this House by counsel for the plaintiffs. He contended that the builders and the plaintiffs were engaged in a joint adventure, in which the builders were the agents of the plaintiffs to obtain applicants for loans, and were authorised to make representations on their behalf, with the result that the builders were authorised to make on behalf of the plaintiffs the statements in the brochure. Even if sound, this argument should not be listened to, for it is not covered by the sanctioned amendment which pleads that the authority is to be found in the specified correspondence. However, the contention is unsound. It completely misapprehends the position existing between the builders and the plaintiffs. There was no joint adventure. There were, when pooling agreements became binding, separate and concurrent enterprises, each no doubt to some extent dependent on the success of the other, but the builders were in no sense the agents of the plaintiffs. Moreover, even if it could be said that they were such agents as suggested, while they would have authority to make, on behalf of their principal, statements in regard to the amount which the lender was prepared to advance, I do not understand how they could have authority to make any statement as to the value of the property which the borrower offered as security for the loan.

LORD WRIGHT: My Lords, my noble and learned friend VISCOUNT MAUGHAM has fully dealt with the facts in this appeal which is limited to the counterclaim. I do not desire to add to his recapitulation of those facts. Indeed, I should not have delivered a separate opinion if it had not been that the House is differing from a careful opinion of the Court of Appeal. I venture to think that the error into which, with all respect, the court have fallen is due to their failure to recognise the importance of the established rule that fraud must be precisely alleged and strictly proved, and the further rule that an amendment alleging fraud should not be allowed in the appellate court unless the party charged has had the opportunity of defending himself, not merely by arguments of counsel on the appeal, but by giving evidence in his own defence specially directed to the charge made in the amended pleading.

This House would only with the greatest reluctance interfere with, or even criticise, the exercise by the Court of Appeal of its discretionary jurisdiction to allow a pleading to be amended; but, where fraud has

been alleged in the pleading and the party has been held guiltless of the charge as so framed, after a trial in which evidence has been directed to the charge so particularised, it would be most unusual to reopen the case by trying in the Court of Appeal, on the evidence given below,
A an amended case of fraud, based on different circumstances. I do not wish to say that such a course can never be justified; but it must almost necessarily involve that the party whose honesty is attacked has no real opportunity of being heard in his own defence. He has not been enabled to lead evidence directed to the specific particulars of fraud
B alleged in the amendment. He has directed his evidence in the court below to the original charges made. He is entitled to have his honesty in regard to the new particulars specifically challenged, and to have an opportunity, in examination or cross-examination, or both, of answering the charge personally. Where there is any danger of this
C right being denied by an amendment in the Court of Appeal, the court should, in my opinion, in the interests of justice and fair play, allow the amendment only on the terms that the new case should be dealt with by a fresh hearing directed to the new issue, unless the party waives the opportunity of having the new issue properly ventilated
D by new evidence, or perhaps, in very special cases, where no fresh evidence is possible. However, I find it difficult to think of any case in which a party charged with fraud should not have the chance of clearing his character by his personal oral evidence.

In the present case, the directors of the appellant company had elected
E not to give evidence, but they were not personally implicated. If there was fraud on the part of the appellants, the person responsible can, so far as the evidence goes, only have been Clough, the officer of the appellants who on their behalf conducted the details of the negotiations between the respondent and the appellants. He did, indeed, give
F evidence, and was subjected to a prolonged cross-examination, which because latitude was naturally given to the respondent who conducted her case in person, roamed over a wide area, far beyond the limits of the pleaded case. That case was based on fraudulent representations made at an interview by the builders' agent or agents, but the case alleged
G was that the appellants were present by some representative, and were thus a party to the mis-statements which, it was alleged, they must have known to be false, and on which the whole transaction was based. That a fraud was perpetrated on the respondent by the builders, and that she was thereby induced to buy the house, has been found by the judge,
H and is not disputed. It is also clear that the most essential elements in the fraud were the false statements in the brochure, in particular the statement that the willingness of the appellants to advance 95 per cent. of the value was conclusive proof as to the excellence and value of the building. The judge held, however, that the appellants were not responsible for that fraud. The Court of Appeal have now held them responsible for the fraud on a view of the facts not even justified by the

amended pleading. The ground adopted is that the appellants [p. 311] "associated themselves with the fraud, and are, therefore, responsible for it," and became "participators in the fraud." This view seems to give the go-by to the amended pleading, which alleged that the crucial misrepresentations were made by the builders with the authority of the appellants. That charge completely failed. The judgment of the Court of Appeal proceeds, as I understand it, on a different ground. This seems to be that the representations made on Feb. 9 by the builders were never withdrawn, and were, therefore, in continuous operation on the mind of the respondent, and that the appellants must have known of the representations, of their falsity, and of their effect in inducing the respondent, not merely to buy the house from the builders, but to obtain the loan from the appellants, so that they were knowingly availing themselves of the builders' fraud and reaping its fruits.

I do not question that, if a person knowingly and deliberately profits by another's fraud, he may be properly held to have participated in the fraud and to be liable for the damage. This may happen where a continuing false representation has been made by a person, on the basis of which the transaction is concluded. I am prepared to assume here that, not only may that person be guilty of fraud (*With* v. *O'Flanagan* (10), at p. 584), but so also may any person who, though not a party to the fraudulent original representation, afterwards learns of it and deliberately and knowingly uses the delusion created by the fraud in the injured party's mind in order to profit by the fraud. Fraud involves deliberate intent, which is called *mens rea.* Nothing short of the wicked or guilty mind will serve, as this House held in most striking circumstances in *Derry* v. *Peek* (4), where the statement complained of was, to the knowledge of the directors, not true in fact, but they mistakenly thought that it was as good as true, whereas events completely falsified their expectation, to the damage of the plaintiffs. However, the directors were held not to be liable, because they were innocent of any intention to deceive. There, as here, there was no fiduciary relationship such as was found in *Nocton* v. *Ashburton* (*Lord*) (5). No case was raised, either in *Derry* v. *Peek* (4) or here, of a duty to give true information and a breach of that duty. There was no common adventure as between the builders and the appellants. The appellants and the respondent were at arm's length in a transaction which involved a borrowing by the respondent from the appellants, who actually advanced the cash.

The case against the appellants must, even as amended, depend on fraud, and nothing else. I fully agree that fraud may assume many disguises and wrappings, but the court will always look at the substance, and, if it finds the wicked intent and consequent damage, will give effect to its findings. As *Sir Horace Davey, Q.C.*, is reported to have said in his argument in *Derry* v. *Peek* (4), at p. 339:

> Fraud never has been and never will be exhaustively defined, the forms which deceit may take being so many and various. There is a negative characteristic :

> it must be something which an honest man would not do; not merely what a logical or clear-headed man would not do.

In the present case, the crucial question is whether Clough, for whose fraud, if there were fraud, the appellants would be liable, acted dishonestly. It is just there that the mischief of trying the amended case without a rehearing becomes so apparent. Clough was never asked whether he carried through the deal with the dishonest appreciation that the respondent was being deceived, or whether he deliberately associated with the builders in the fraud they were perpetrating. He was asked about the brochure, in particular about the crucial statement in it as to the willingness of the building society to advance 95 per cent., assuming that the statement applied to the appellants. He admitted that, if it was intended to apply to the appellants, it was not true. He was then asked:

> You knew it was not true the whole time you were advancing on the Coneyhall Estate.

He answered:

> If that statement appeared the whole time, it was not true at any time, but to say that I knew about it is wrong. I certainly knew it was there, but I certainly did not attach the importance to it that you attach to it.

This is the piece of evidence which seems to me to come most nearly to the point. If the case of guilty participation was to be made, Clough ought to have been closely pressed upon it and given an opportunity of explaining his position in detail. However, bearing in mind all the peculiar circumstances of the case, I see in those answers no sufficient ground for imputing fraud to Clough, or, through him, to the appellants. His evidence is fully consistent with honesty. He did not feel concerned about the brochure or attach importance to its statements. Before the alteration of the law by the Building Societies Act, 1939, particularly by sect. 9, such an attitude is not incomprehensible, though it is to be regretted. The only question in this case, however, is whether fraud is established against the appellants. I agree with all your Lordships that the correspondence relied upon by the Court of Appeal does not contain any evidence supporting a charge of fraud against the appellants in any form. The whole case seems to depend on the view taken of Clough. The judge regretted the absence from the witness box of the directors, but no case was pleaded for them to answer. As to Clough, the judge, who saw and heard him for a long time in the witness box, found no reason to comment adversely on his good faith. In my opinion, the judgment appealed from cannot be supported. I agree that the appeal should be allowed.

LORD ROMER [read by LORD PORTER]: My Lords, the facts of this case have already been stated by VISCOUNT MAUGHAM and I need not repeat them. From the facts so stated, it appears that the gist of the respondent's complaint is that, by reason of the statements contained in the brochure handed to her by Morrells on Feb. 1, 1934, she was

induced to believe, and to act on the belief, that the house and garage which she subsequently agreed to purchase from Morrells were worth the £730 which she paid for them. That the respondent was in this way defrauded by Morrells is no longer in dispute. It is plain that the premises in question were not worth £730, or anything like that sum, A
and that statements contained in the brochure designed to induce in the mind of the reader the contrary belief were untrue to Morrells' knowledge. The question to be decided upon this appeal, however, is whether any fraud has been practised upon the respondent by the appellant building society. B

My Lords, the grounds upon which the respondent has based her charge of fraud against the appellants has varied from time to time in the course of the proceedings. At the trial before BENNETT, J., she alleged that the fraudulent representations as to the value of the house were [p. 499]: C

> . . . made to her orally by a number of persons on Feb. 9, 1934, and that one of such persons was introduced to her as an agent of the plaintiffs.

This allegation, however, was not supported by the evidence. It was proved, on the contrary, that no representative of the appellants was present at the interview in question. Accordingly, when the matter D
came before the Court of Appeal, the respondent changed her ground. Having obtained leave from that court to amend her pleading, she then alleged that the brochure containing the false and fraudulent representations was issued by Morrells to her with the authority of the appellants. The representations were first made to her, she alleged, by Morrells, with E
the authority of the appellants, handing the brochure to her on or about Feb. 1, 1934, and were in continuous operation until after Sept. 18, 1934. Any representations thus made would no doubt be deemed to be in continuous operation down to the completion of the mortgage of the house to the appellants; but, if the representations were first F
made on Feb. 1, 1934, they were also then lastly made, for the respondent does not appear to have had more than the one copy of the brochure which was handed to her by Morrells on that date. The respondent further alleged that the representations were untrue to the knowledge of the appellants, and that they induced her to enter into the contracts G
with Morrells for the purchase of the house and garage and to apply to the appellants for an advance upon those properties. These several allegations would have enabled the respondent to have succeeded in her counterclaim against the appellants founded upon their deceit had she been able to prove them. Whether or not they have been proved is a H
question which I will consider presently. It is sufficient for the moment to say that they do not appear to have been the ground upon which the Court of Appeal based their decision in the respondent's favour. I cannot discover in their judgment any finding that the brochure was handed to the respondent by Morrells as agents for, or with the authority of, the appellants. They appear rather to have based their decision upon

the ground that, when the appellants made the advance of £693 to the respondent upon the security of her house and garage, they did so with full knowledge that she had been induced to purchase the properties by the fraudulent representations of Morrells, and in that way A "associated themselves" with, and were, therefore, responsible for, the fraud. CLAUSON, L.J., said, at p. 311:

> . . . they must have known that it was under the influence, and through the inducement, of the false representations that the defendant, having originally entered into the contracts with Morrells, was proceeding to complete those contracts, and, as an integral and indispensable part of that completion, accept the obligations B of a borrower towards the plaintiffs. It appears to us to result quite clearly that the plaintiffs thus became liable, as participators in the fraud, for any damage which the defendant has suffered thereby.

The appellants are a corporation, and any knowledge which they may have possessed of the fraud practised by Morrells upon the respondent C must necessarily have been knowledge of one or more of their agents. CLAUSON, L.J., did not state in terms who these agents were, but counsel for the respondent said that they were Clough and Feldmar. Feldmar was the agent of the appellants (so far as this case is concerned) for the sole purpose of obtaining the execution by the respondent of the mortgage D of Oct. 10, 1934, and, though he had knowledge of Morrells' fraud, he had not acquired this knowledge as agent of the appellants, and was under no duty to communicate such knowledge to them. The appellants cannot, therefore, be in any way affected by the knowledge of Feldmar. Clough no doubt stands in a different position, and any knowledge which E he possessed of Morrells' fraud must have been acquired by him as the agent of the appellants. In truth, however, he had no such knowledge. He had seen the brochure of which a copy had been given by Morrells to Mrs. Borders on Feb. 1, 1934, but he did not know that any of the statements in it were untrue. If the appellants at that time had been F the building society referred to in the brochure, Clough would have known that the statements in it referring to a building society were untrue, but the building society there referred to was an entirely different society, and there is no evidence that Clough knew that the statements referring to that society were untrue. Nor, indeed, is there any evidence G that Clough knew that Mrs. Borders had ever seen the brochure. For these reasons, I find myself quite unable to arrive at the conclusion that, when the appellants advanced the £693 to the respondent, they did so with knowledge that she had been induced to purchase her house and garage from Morrells and accept the obligations of a borrower towards the appellants by Morrells' fraudulent representations.

H It still remains to deal with the allegation, put forward by the respondent in the amendment of her defence, made with the leave of the Court of Appeal, that the brochure shown to her on Feb. 1, 1934, was issued to her by Morrells with the authority of the appellants. All I can say about this is that I cannot find the slightest evidence of any such authority ever having been given. Even if it be true that

Morrells were the agents of the appellants for the purpose of procuring applications for loans from them by persons who had agreed to purchase houses on the Coneyhall Estate, Morrells would have had no authority merely by reason of such agency to induce applications by making representations as to the value of such houses. It is not within the scope of the authority of an agent of an intending mortgagee to make representations as to the value of the property to the intending mortgagor, nor could any such representations, if made, in any way affect the mind of an applicant to the appellants for a loan. The fraudulent representations of Morrells would have fully accomplished their purpose when they had induced the contract of purchase. The purchaser would require no inducement whatsoever to apply for a loan of 95 per cent. of the purchase money. He would have been only too glad to get it. The truth of the matter is that, if the respondent is to succeed on this aspect of the case, she must show that Morrells were the agents of the appellants, not merely to obtain applications for loans from purchasers, but to induce as many persons as possible to become purchasers. I can find no scrap of evidence to indicate that any such agency as this was ever contemplated either by the appellants or by Morrells. In my opinion, the appeal should be allowed, and I concur in the motion before the House.

Lord Porter: My Lords, this is an appeal from a decision of the Court of Appeal, who reversed the judgment of Bennett, J., and held the appellants guilty of fraud and liable in damages. The facts have already been fully stated, and I do not propose to repeat them. The appellants' claim to possession having failed, the only question for your Lordships' consideration is the respondent's claim for damages for fraudulent misrepresentation. Before Bennett, J., she relied upon the allegation that a representative of the appellants was present at the vital interview on Feb. 9, when, according to the evidence, she was not only shown a brochure, but was orally informed by Morrells' agent that Morrells were the only builders in Great Britain who could offer, by special arrangements with a leading building society, a 95 per cent. mortage advance over a period of 24 years at 5 per cent. interest, that this fact proved beyond a shadow of doubt the amazing value of Morrells' homes, and that each house was individually inspected by the surveyor of the building society during the course of construction and again when the last coat of paint was finished. Both these allegations were found by Bennett, J., to be false to the knowledge of Morrells, but in his opinion, the respondent failed in her claim against the appellants because she had failed to establish that any representative of the appellants was present at the interview.

In the Court of Appeal, an entirely new case was made on behalf of the respondent. It was suggested to, and accepted by, that court that the correspondence between the appellants and Morrells leading up to the pooling agreement showed inevitably that the appellants through their agent Clough knew of, and appreciated, the falsity of the statements contained in the brochure, which had been in their hands since Dec. 1933, and, accordingly, were implicated in Morrells' fraud. A The grounds of the decision were that those statements held out the appellants as being prepared to advance an unusually high proportion of the purchase price of Morrells' houses because they were particularly well built, that such a representation was untrue to the knowledge of the appellants, that, though it was originally put forward by Morrells alone, B yet the appellants [p. 311]:

> . . . associated themselves with the fraud, and are, therefore, responsible for it, for they had knowledge of the false representations, and of their falsity, and they must have known that it was under the influence, and through the inducement, of the false representations that the defendant [the respondent], having originally entered into the contracts with Morrells, was proceeding to complete those contracts, and, as an integral and indispensable part of that completion, accept the obligations C of a borrower towards the plaintiffs [the appellants].

For the purpose of raising this point, the Court of Appeal allowed an amendment of the pleadings alleging that the brochure was issued with the authority of the appellants, that its representations were false, and made by the appellants with the knowledge that they were false, or recklessly D not caring whether they were true or false, that the representations were first made by Morrells with the authority of the appellants on or about Feb. 1, and were in continuous operation until after Sept. 18, 1934, and that the authority is to be found in, or inferred from, the correspondence passing between the appellants and their agents and Morrells E and their agents during the period from Dec., 1933, to Mar. 6, 1934, and from the brochure itself. They recognised that this claim was not covered by the original pleading, but considered that, as the correspondence was certainly discussed, no injustice was done by allowing the claim to be raised in the form adopted by the amended pleadings.

F When the case was presented to your Lordships, the appellants argued, as they had argued below, that the letters were no evidence of participation by them in the misrepresentations of Morrells, and that, indeed, there was nothing from which it was to be inferred (i) that Mrs. Borders had seen the brochure, or (ii) that the representations referred to the G appellants, or (iii) that, even if the representations were intended by Morrells to refer to the appellants, the appellants knew that they were the building society referred to, or (iv) that in fact they were false at the time they were published, since they may have been true of another building society, or (v) that Clough must inevitably have H interpreted them as meaning that his society had agreed to advance an exceptionally large proportion of the contract price on the security of the house alone, or (vi) that the appellants were under any duty to consider the truth or falsity of the statements inserted in the brochure by Morrells for the purpose of selling their houses.

The respondent's representatives, in addition to supporting the judgment of the Court of Appeal, also put her case on a somewhat wider basis. In their contention, first, Feldmar may have been the agent of the appellants acting within the scope of his authority when he obtained Mrs. Border's signature to a mortgage of the house on Sept. 18, 1934. He had originally discussed the brochure with the respondent, and knew that its statements were false, and that she relied upon them. He therefore knew that she ultimately authorised the advancement of the money and completion of the purchase on the strength of its fraudulent representations. This argument was not pressed, since it was recognised that Feldmar's only authority *vis-a-vis* the appellants was to obtain a signature to the mortgage, not to make or continue representations, and, in any case, knowledge gained by him as representative of Morrells could not be imputed to the appellants. On either view, it was obviously untenable. Secondly, it was argued that Morrells may have been the agents of the appellants acting within the scope of their authority when they induced the respondent on Feb. 9 to agree to purchase the house by false representations.

For the purpose of this argument the connection between Morrells and the appellants was put in a variety of ways. It was said that the business was obtained for both the builders and the appellants, that Morrells had authority to persuade those desiring to purchase houses to apply for loans, and that the forms of application were sent for this purpose, that Morrells were acting in the joint interest of themselves and of the appellants, and that it was a joint adventure. It did not, it was said, make any difference that, when the representations were made to the respondent, the pooling agreement had not been signed. The appellants authorised the obtaining of the applications. They might or might not accept them, but, if accepted, they were none the less obtained on the strength of the false representations in the brochure. I think all your Lordships are agreed that this argument cannot succeed.' It depends on proof of Morrells' agency. To my mind, the relation of builder and building society is not that of co-adventurers or agent and principal. The builder desires to provide facilities to enable his clients to borrow part of the money required to complete their purchase. For this purpose, he approaches a building society in order to ascertain what amount they will advance, the security required, and the terms of repayment. The building society are not concerned with the inducements used to persuade the purchaser to buy. So far as the evidence goes, even after signing the agreement, the appellants were under no obligation to lend any money at all, and Morrells were under no duty to obtain business for them. Each was an independent person acting in his own interest. Morrells had not acted as the appellants' agent, but had arranged that their clients should be able to apply to the appellants for a loan on stated terms as to security and repayment, leaving it to the parties concerned to carry out the transactions if they wished. All that the appellants had done was to forward a set of forms so that Morrells' clients might, if they desired, apply to them for a loan on the terms which had been arranged between Morrells and the appellants as terms upon which the latter would be willing to advance part of the price of the house to the buyer if in an individual case they decided to do so. No evidence was given from which it appeared either that Morrells were under an obligation to request their clients to apply to the appellants, or to the appellants in preference to any other society, or that the appellants were obliged to grant a loan if and when an application was made, nor were the appellants concerned to consider or inquire into the truth of any allegations made by the builders, or to analyse the statements in the brochure. Their part begins at a later stage. If a would-be purchaser, having satisfied himself as to what he was buying, came to them for a loan, they would then consider the advisability of making an advance to him, trusting to the security of the house as reported on by their surveyors, together with the pool and the personal liability of the borrower. They neither persuaded nor authorised Morrells to persuade her to buy. On this broad ground, I should reject the respondent's argument under this head, but I think that there is a narrower ground on which also your Lordships should refuse to accede to it. Even if, in a case where fraud is alleged, so drastic an amendment of the statement of claim as that allowed by the Court of Appeal is permissible, yet in the present case I doubt whether the conclusion reached in that court is covered by the pleading. I see no evidence to support the allegation that the brochure was issued by Morrells on Feb. 1 with the authority of the appellants.

Thirdly, it was argued that, if neither Feldmar nor Morrells were agents of the appellants, the respondent, if she is to hold the judgment she has obtained, is thrown back on the argument which succeeded in the Court of Appeal—namely, that Clough knew that the representations had been made in order to induce Mrs. Borders to buy, knew that they were false and that she had been so induced, and that she would not have borrowed the money to complete the transaction had she known of the falsity. At that date there was no established relationship between the appellants and Morrells. They were merely negotiating. In such circumstances, I cannot see any ground for imputing to the appellants the giving of an authority to issue a book with which they were not then, and might never be, concerned. To this extent, the fact that the pooling agreement had not then been finally agreed or signed is important.

Whatever success might attend this argument if the necessary facts could be established, I think that it fails for want of proof. It has to be remembered that originally no claim was made on this basis, and, though the brochure and Clough's reactions to it were incidentally discussed in the course of the trial, his mind was not directed to such a point, nor was a charge of fraud made against him. Indeed, there is no reason for believing that BENNETT, J., considered him to be fraudulent. The brochure was printed and issued before the appellants came on the scene. Its representations originally applied to another building society. It was not for the appellants to suspect its falsity with regard to that society, of whom it might have been true. Nor did the appellants know that it had been shown or representations similar to those contained in it made to the respondent. Even though, as was suggested on her behalf, Morrells had already determined to persuade her to use the facilities offered by the appellants, there was no evidence that the appellants, if they thought about the matter at all, had any reason to suppose that such representations had in fact been made or the brochure shown. However, assuming that Clough knew that Mrs. Borders had been shown the brochure, I do not think that he would necessarily think its statements false. The substantial complaint was that the building society referred to was willing to advance 95 per cent. of the balance of the purchase money on the security of the house alone because it was so well built. A lawyer interpreting the document would no doubt realise that that was its true construction, but I am not sure that a layman would do so, and I see no reason for supposing that a layman who was not directly concerned with the statements would so interpret them. When the exact wording was pointed out to Clough and its suggested application to his society brought to his mind, he saw its falsity at once, but, as I understand his evidence, he did not so interpret it until that time. Indeed, his evidence goes further. He never thought of his society in connection with the representations, or considered them at all. He neither recognised them as applying to the appellants nor thought of them as false or recklessly made, nor, indeed, regarded his society as putting them forward. The claim is for damages for fraudulent misrepresentation, not for recission. In such a case, proof of fraud is, of course, essential if the respondent is to succeed, and, as *Derry* v. *Peek* (4); shows it is not enough that a representation is in fact false when rightly understood. Its falsity must be apprehended by the party charged, if fraud is to be imputed to him.

For the reasons I have given, I think that the respondent must be considered to have failed in proving either that Clough was fraudulent or that the appellants were implicated in the fraud of Feldmar or Morrells. Her counterclaim accordingly fails, and, in my view, the appeal should be allowed. In reaching this conclusion, I have not found it necessary to determine what would be the result in a case where, in an action for damages for deceit, defendants who were accused of fraud had honestly made, either themselves or through agents, representations which they then believed to be true but which afterwards became false to their knowledge. The question has been touched upon by Collins and Lindley, L.JJ., in *Arkwright* v. *Newbold* (3), pp. 325, 329. It was not finally decided by them, and need not be decided here. Nor have I reached any conclusion upon the question whether the appellants would be under any liability if they had been proved to have become aware of Morrells' fraud before they advanced their loan. The solution of that problem also may await another occasion. However, although the result is to reverse the decision of the Court of Appeal, the facts of the case do, I think, exemplify a danger to which purchasers of houses on building estates developed by speculative builders were exposed. However A honest a building society, it is undesirable that representations affecting its loans should be made by dishonest builders, or even that purchasers should imagine without any representations that the granting of a large proportion of the price of the house on loan is evidence of its value. This danger, however, has now been met by the Building Societies Act, B 1939, the provisions of which do much to decrease such risks as this case has disclosed.

Appeal allowed with costs. Counterclaim dismissed with costs.

Solicitors: *H. Boustred & Sons*, agents for *J. Eaton & Co.*, Bradford C (for the appellants); *W. H. Thompson* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WOOD AND ANOTHER *v.* LONDON COUNTY COUNCIL.

[Court of Appeal (MacKinnon and Luxmoore, L.JJ., and Stable, J.), **May 12, 13, 1941**.]

Factories and Shops—Factory—Kitchen in public institution—Electrical mincing machine—Dangerous machine—Contributory negligence—Factories Act, 1937 (*c.* 67), *ss.* 14 (1), 151 (1), (9).

The appellant, who was employed by the respondents at the Bexley Mental Hospital, met with an accident while working an electric mincer in the kitchen of that institution. Although she had been shown how to use both the machine and the plunger for pushing the meat on to the mincing-knife, she put her hand through an aperture in the guard for the purpose of dislodging a piece of meat which had become attached to the side of the hopper. The aperture was of such a size that, while it would be impossible for a man to get his hand through it, it was quite possible for a young girl to get her hand through, and, in the latter case, the guard was an insufficient protection. It was contended that the appellant had not been guilty of contributory negligence. For the respondents, it was contended that the kitchen was not a factory within the Factories Act, 1937 :—

Held : (i) the kitchen was not a factory within the Factories Act, 1937.

(ii) the appellant was guilty of contributory negligence.

Decision of Tucker, J. ([1940] 4 All E.R. 149) *affirmed on the second point and reversed on the first.*

[**EDITORIAL NOTE.** The definition of factory in the Factories Act, 1937, is necessarily a wide one and includes many places which are not ordinarily thought of as factories. The kitchen in the present case is far removed from the ordinary conception of a factory. In the court below, the judge held it to be within the definition, but the Court of Appeal have reversed that part of his decision, largely on the ground that many of the provisions of the Act cannot apply to a kitchen.

As to Factories, see HALSBURY, Hailsham Edn., Vol. 14, pp. 561-567, paras, 1071-1076 ; and for Cases, see DIGEST, Vol. 24, pp. 897-902, Nos. 1-36.]

Cases referred to :

(1) *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152 ; [1939] 3 All E.R. 722 ; Digest Supp. ; 108 L.J.K.B. 779 ; 161 L.T. 374.

(2) *Lewis* v. *Denye*, [1940] 3 All E.R. 299 ; Digest Supp. ; *affg.*, [1939] 1 All E.R. 310 ; *affg.*, [1938] 2 All E.R. 813.

(3) *Dew* v. *United British S.S. Co., Ltd.* (1928), 98 L.J.K.B. 88 ; Digest Supp. ; 139 L.T. 628.

(4) *Pringle* v. *Grosvenor* (1894), 21 R. (Ct. of Sess.) 532 ; 24 Digest 911, case *g*.

(5) *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132 ; Digest Supp. ; 103 L.J.K.B. 465 ; 151 L.T. 87 ; *on appeal*, [1936] A.C. 206.

(6) *Pritchard* (*Cardiff Revenue Officer*) v. *Lewis* (*William*) *& Sons*, [1931] 1 K.B. 386 ; Digest Supp. ; 100 L.J.K.B. 1 ; 143 L.T. 650.

(7) *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and Western Mail, Ltd.*. *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and David Duncan & Sons, Ltd.*, *Westminster Revenue Officer* v. *Daily Mirror Newspapers, Ltd.*, [1931] 1 K.B. 47 ; Digest Supp. ; 99 L.J.K.B. 672 ; 143 L.T. 500.

(8) *Moon* (*Lambeth Revenue Officer*) v. *London County Council*, [1931] A.C. 151 ; Digest Supp. ; 100 L.J.K.B. 153 ; 144 L.T. 410 ; *affg.*, [1931] 1 K.B. 385.

(9) *Nash* v. *Hollinshead*, [1901] 1 K.B. 700; 24 Digest 901, *29*; 70 L.J.K.B. 571; 84 L.T. 483.

(10) *Potteries Electric Traction Co., Ltd.* v. *Bailey* (*Stoke-on-Trent Revenue Officer*), [1931] A.C. 151; Digest Supp.; 100 L.J.K.B. 153; 144 L.T. 410; *revsg.*, [1931] 1 K.B. 385.

APPEAL by the plaintiff from a judgment of TUCKER, J., reported [1940] 4 All E.R. 149. The facts are fully set out in the judgment of MACKINNON, L.J.

Gilbert J. Paull, K.C., and *S. R. Edgedale* (for *R. O. L. Armstrong-Jones* on war service) for the appellants.

Tristram Beresford, K.C., and *R. T. Monier-Williams* for the respondents.

Paull, K.C.: The appellant had not worked an electric mincer until the morning of the accident. The degree of blame attaching to her is very small. In order that contributory negligence may be a defence under the Factories Act, 1937, the conduct of the injured person must approach recklessness. Even if the appellant has been careless, her conduct has not been such as to deprive her of the benefit of the Factories Act, 1937. The words of LORD WRIGHT in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1) apply to the present case. It is necessary to disregard the atmosphere of logical reasoning in these matters and to consider the state of mind of a kitchenmaid who is inexperienced in the use of a machine of the type in question. *Lewis* v. *Denye* (2) was a different case from the present one, in that the appellant in the present case had not been told what to do, and had been left to her own resources. Contributory negligence is of no avail when a workman is trying to carry out that which he has been told to do to the best of his ability. [Counsel referred to *Dew* v. *United British S.S. Co., Ltd.* (3) and *Pringle* v. *Grosvenor* (4).]

Edgedale, following on the same side: In the present case, the machine was not securely fenced. Mere inattention by a workman to his own safety will not disentitle him to damages should an accident occur. [Counsel referred to *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.* (5).]

Beresford, K.C.: If the kitchen is not a factory, the argument that the appellant was not guilty of contributory negligence falls to the ground. If it were a factory, the provisions of the Factories Act, 1937, regarding Sundays off, limitation of hours, exhibition of notices, and other matters, would all apply. If the decision of the judge on that point is right, the mental hospital must close down on Sundays and no work can be done in the kitchen on a Sunday. The purpose to be regarded is the primary purpose of a kitchen. That primary purpose is not the breaking up and mincing of food, but the preparation of meals for the patients and the staff. One gets a good deal of assistance from the cases which have been decided under the Rating and Valuation Act, 1928, because industrial premises are rated differently from other premises. The kitchen is clearly not a factory, and the appeal should be dismissed. [Counsel referred to *Pritchard* (*Cardiff Revenue Officer*) v. *Lewis* (*William*) *& Sons* (6), *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and Western Mail, Ltd.* (7), *Moon* (*Lambeth Revenue Officer*) v. *London County Council* (8), and *Nash* v. *Hollinshead* (9).]

Paull, K.C., in reply: One cannot escape the conclusion that the kitchen of this mental hospital comes within the definition of a factory. The authority is under an obligation to supply proper plant which can be used with safety. [Counsel referred to *Potteries Electric Traction Co., Ltd.* v. *Bailey* (*Stoke-on-Trent Revenue Officer*) (10).]

MACKINNON, L. J.: This is an appeal by the plaintiff from a judgment of TUCKER, J., in favour of the defendants. The plaintiff was a girl of 19 or 20 years of age, and was in the employ of the defendants at the Bexley Mental Hospital, which in less refined times would probably have been described as a lunatic asylum. There were some 2,000 patients in that institution and a staff of some 300. It was thought necessary to have a kitchen, as part of the institution, to provide meals for the inmates and for the staff, and the plaintiff was employed as a kitchenmaid in the kitchen. One of the operations occasionally carried on in the kitchen was mincing meat or other food, and there was an apparatus for doing so. It was rather more elaborate than the common domestic mincing machine which we have all seen in our own kitchens, where one turns a handle and so gives motion to the metallic part of the inside of it which breaks up the meat, because that interior part in this machine was worked by a small electric motor, so that the person who was mincing the meat had only to feed the meat into the hopper. The motion inside the machine was provided by an electric motor. That electric motor could be switched off by a switch which was two steps away from the table on which the machine was erected. The plaintiff was put to do this work. The machine was switched on, and for some time she fed meat into it, she said for about ten minutes. She was provided with a wooden plunger to push the meat down, so that it came in contact with the revolving part of the machine. After a time, she said, some of the meat got stuck round the edges of the hopper or funnel into which it was put, and, in order to dislodge it, without stepping to the switch and cutting off the power to the revolving part within, she shoved her hand into the orifice into which the meat went. We were told, but it is not material here, that, when the machine was originally supplied, it had not got anything like this protecting grill at the top, but the defendants thought that possibly somebody might be so foolish as to put her hand into it without switching off the motor and so might get hurt, and, accordingly, they had this metal screen or shield put at the top, with a round orifice in the middle of it into which the wooden plunger could be put. That circular orifice is in fact 2⅝ins. in diameter. An ordinary person—I should think most women, and I should think nearly all men—would be unable to get their hand sufficiently far down that 2⅝ins. hole to get anywhere near the dangerous revolving part below, but the plaintiff, apparently, had so small a hand that she was (I should imagine with some pushing) able to put her hand in, and did put her hand in, and shoved it right down to the bottom, where the revolving metal mangled her fingers and, I gather, caught them in some way, because she apparently screamed and did not pull her hand out until someone rushed up and turned off the switch. She was then taken to hospital, and unfortunately a septic condition resulted in the damaged fingers, which necessitated the amputation of all the fingers of her right hand.

She brings this action in respect of this accident claiming damages from the defendants, and she brings her action upon the basis that this kitchen was a factory within the meaning of the Factories Act, 1937, and that, therefore, under sect. 14 of that Act, it was an obligation on the defendants to comply with that section, which says that every dangerous part of any machinery shall be securely fenced. Because the opening to that mincing machine was 2⅝ins. in diameter, she says that the dangerous part of the machine within was not securely fenced. It ought to have been ⅜in. less in diameter. She says that, if it had been ⅜in. smaller, even, she could not have got her hand through the hole, and it would have been an effective fencing to prevent her from putting her hand into the machine as far as she did.

The judge decided two things in this case. He acceded to the argument that, within the definition of the Factories Act, 1937, this kitchen was a factory. He acceded to the proposition that, because this circular opening in the top of the machine was ⅜in. wider than it might have been, the dangerous part of this machine was not securely fenced, and, therefore, there was a breach of sect. 14 of the Act. *Prima facie*, that would have meant judgment for the plaintiff, but finally the judge decided that the accident was really brought about by the contributory negligence of the plaintiff in pushing her hand into this palpable danger as she did, and that, as a result of that contributory negligence, she was not entitled to claim damages against the defendants.

The appeal alleges that the ultimate decision of the judge in favour of the defendants was wrong, and it was mainly argued by counsel for the plaintiff, the appellant before us, upon the ground that the judge was wrong in holding that there was, in the circumstances, any contributory negligence on the part of the plaintiff. Counsel for the defendants was, of course, entitled to maintain the judgment in his favour upon any ground of law which was debated in the court below, all of which are equally open to him here, and he asks us to disagree with the first part of the judge's judgment—namely, that in which he held that this was a factory. That question arises in this way. It is said that this was a factory by reason of sect. 151 of the Act. The headnote of that section is, "Interpretation of expression 'Factory'," and the material words which are relied upon are these:

> (1) Subject to the provisions of this section, the expression "factory" means any premises in which . . . . persons are employed in manual labour in any process

> for or incidental to any of the following purposes, namely . . . (*b*) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article . . . being premises in which . . . the work is carried on by way of trade or for purposes of gain . . .

Reliance was then placed upon sect. 151 (9), which provides as follows :

> Any premises belonging to or in the occupation of . . . any municipal or other public authority shall not be deemed not to be a factory . . . by reason only that the work carried on thereat is not carried on by way of trade or for purposes of gain . . .

It is said that the plaintiff was employed in manual labour. That is true. She was employed in manual labour in a process for or incidental to that of one of the following purposes—namely, the breaking up or demolition of any article, which I think is the principal thing relied on, and is enough—the subsequent words about work being carried on for the purpose of trade or gain being cut out and rendered unnecessary to be added to the definition, because these premises were in the occupation of the London County Council, and, therefore, are within subsect. (9). After those extraordinarily general words in the first part of sect. 151, the section continues as follows :

> . . . and (whether or not they are factories by reason of the foregoing definition) the expression " factory " also includes the following premises in which persons are employed in manual labour, that is to say . . .

Then there is a list of 13 different types of premises in which various processes are being carried on, and those types of premises are described. It is not without importance, I think, to observe that, among those 13 specific types of premises, one which is specified in subpara. (v) is :

> . . . any laundry carried on as ancillary to . . . the purposes of any public institution.

There is no doubt that the laundry attached to this mental hospital would be within that definition of a factory in clear terms. Whether, if it be a factory, it would also be a factory within the general words at the beginning, because the persons there employed are employed in manual labour in any process for or incidental to the washing of any article, is perhaps a much more difficult question. Also, it is not without importance to observe that, if this kitchen is a factory, all the provisions of the Factories Act, 1937, would have to apply to it. It is not necessary to refer to all of them, but by way of example I may point out that by sect. 70, under the headings " Hours and Holidays " and " Employment of Women and Young Persons," it is provided that the period of employment shall not exceed 11 hours in any day, and shall not begin earlier than 7 a.m. nor end later than 8 p.m., or, on Saturday, 1 p.m. Those are provisions which I should think would be quite impossible to apply to the work being carried on in the kitchen of this asylum, particularly the provision that no work shall be done earlier than 7 a.m. or later than 8 p.m. Then, by sect. 72, if this kitchen were a factory, the county council would be bound to put up in the kitchen a formal notice providing various things about the periods of employment and the intervals for meals and rest and all that sort of thing. If they did not put up such a notice, apparently, under sect. 131, they would be liable to a penalty not exceeding £20. What is still more remarkable, if this kitchen were a factory, is the effect of sect. 77, which provides as follows :

A

> Subject to the special exceptions allowed under this part of this Act, a woman or young person shall not be employed on Sunday in a factory . . .

The special exceptions to which the notes to the section refer are under sect. 91 (1), which provides as follows :

> Where the occupier of a factory is a person of the Jewish religion, or a member of any religious body regularly observing the Jewish Sabbath [the provisions as to Sunday in that section may be taken to refer to Saturday].

B

Those are some of the extraordinary results which would follow if this kitchen was a factory, quite apart from one's surprise, from the point of view of common sense, that an ordinary kitchen (a kitchen no doubt on a very considerable scale, because there are over 2,000 people to cook for) could be within the definition of a factory at all. Counsel for the C plaintiff was quite consistent in his argument, because he did not shrink from agreeing to my suggestion that, if this was an ordinary little cottage hospital run by some rural district council, with perhaps two people in its small kitchen, those premises would be a factory, because there would be persons employed in manual labour in a process incidental D to one of the following purposes—namely, the washing of an article, that is to say, the ordinary washing up of a few plates and dishes which had been used in the other part.

I fully recognise that, in construing an Act, one is not to be deflected from giving it its proper meaning by looking at and citing absurd lengths E to which the definition may drive one, but I do not think that it is improper to take into account the whole nature of these premises and the nature of the work which is going on in them. In my view, a kitchen is not within this definition of a factory by reason of the fact that dishes are washed up in a kitchen, or by reason of the fact that articles are altered, F finished or cleaned in a kitchen, or by reason of the fact that articles are ornamented, as, for instance, by providing icing sugar on a cake, or parsley for a garnish for dishes. A kitchen which is carried on in a large way by people running a restaurant for the purpose of trade or gain would not, by reason of those words, become a factory within that section. G

If that be so, this appeal fails upon the first ground which it is necessary to establish in order to support the decision. For my part, however, I think that I ought to add that it would have been sufficient for the dismissal of this appeal for me to say that, even assuming that the judge was right in saying that this was a factory and that this machinery was not H securely fenced, I think that the judge was right in holding that this accident occurred owing to the contributory negligence of the plaintiff in acting as she did. It is not necessary to say very much about that. I think that the thing speaks for itself. Counsel for the plaintiff has spoken a good deal about the absence of instructions as to how to use this machine, and about the fact that the plaintiff was not warned that she must not put her fingers down the machine. This is not a complicated machine. It is the simplest thing in the world. Its method of use is apparent on looking at it. The only difference between this and the ordinary domestic article known as a mincing machine is that, in this case, instead of the operator having to twist the handle to move the worm inside, that movement is provided by a small electric motor which can be switched on and off. It must be apparent to anybody of the meanest intelligence that, if one puts one's hand down on to that worm, when one is twisting it round oneself, one is likely to hurt one's fingers by bringing the metal into violent contact with them. If, instead of working it oneself with a handle, one switches on the motor which makes it turn round, it must be equally apparent to the meanest intelligence that to shove one's hand down on to that worm is likely to cause injury. More than that, I should have thought that it would have been fairly obvious from the provision of this screen at the top, that one was not intended to do that, and for anybody with difficulty—because I feel sure it must have been with difficulty—to push her hand down on to this dangerous machine is almost as ridiculously obviously courting disaster as it would be if she were deliberately to put her fingers between the bars into red hot coal. In those circumstances, if there was ever a case in which someone who has suffered from that sort of rash act should be debarred by the defence of contributory negligence from recovering against the employer, or the persons liable, I think that this must be one, and I agree with the judge in that part of his judgment. On both these grounds, I think, this appeal fails, and should be dismissed with costs.

Luxmoore, L.J. : I agree.

Stable, J. : I agree.

Appeal dismissed with costs.

Solicitors : *W. H. Thompson* (for the appellants) ; *J. R. Howard Roberts*, Solicitor to the London County Council (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

SUMMERS *v.* SALFORD CORPORATION.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Stable, J.), **May 7, 8, 1941.**]

Landlord and Tenant—Repairs—Statutory obligation—Extent of obligation—Broken sash-cord—Housing Act, 1936 (*c.* 5), *ss.* 2, 188 (4).

The appellant was the tenant of the respondent corporation of premises to which the Housing Act, 1936, s. 2, applied, so that the corporation impliedly undertook that during the tenancy the premises would be kept in all respects reasonably fit for human habitation. In Feb., 1940, or Mar., 1940, the appellant notified the corporation that one sash-cord of one of the windows in the premises was broken. On Apr. 3, 1940, the other sash-cord broke while she was cleaning the window and she was injured. She claimed damages on the ground that the respondents had broken the covenant implied in her tenancy agreement by the Housing Act, 1936, s. 2 :—

HELD (LUXMOORE, L.J., *dissenting*) : the onus was upon the appellant to establish her case, and she had failed to establish, in the circumstances, that the respondents failed to keep the premises reasonably fit for human habitation.

Decision of CROOM-JOHNSON, J. ([1941] 1 All E.R. 153) *affirmed.*

[**EDITORIAL NOTE.** The question here considered was the subject of certain observations of the Court of Appeal in *Morgan* v. *Liverpool Corpn.* (1). In that case there was a difference of opinion, and here, when the matter has come up for re-consideration, there is again a difference of opinion. The question at issue is the extent of the statutory obligation to keep the property in repair and whether it includes an obligation to do such minor repairs as the replacement of a broken sash-cord.

AS TO IMPLIED COVENANT TO REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 204-206, paras. 223, 224 ; and FOR CASES, see DIGEST, Vol. 31, p. 348, Nos. 4900-4904.]

Case referred to :

(1) *Morgan* v. *Liverpool Corpn.*, [1927] 2 K.B. 131 ; Digest Supp. ; 96 L.J.K.B. 234 ; 136 L.T. 622.

APPEAL by the plaintiff from a judgment of CROOM-JOHNSON, J., sitting at the Manchester Assizes, dated Dec. 5, 1940, and reported [1941] 1 All E.R. 153. The facts are fully set out in the judgment of LUXMOORE, L.J.

N. H. Lever for the appellant.

Humfrey H. Edmunds for the respondents.

Lever : The present case was not one of window-cords being left unrepaired for a day or two. They were left unrepaired for several weeks. To get proper light and air into the room involved risk to the occupier. If a house is not fit for human habitation in one respect, it cannot be said to be fit in all respects. If the defect is one which a reasonable man would not allow to continue indefinitely, there has been a breach of the Housing Act, 1936, s. 2. [Counsel referred to *Morgan* v. *Liverpool Corpn.* (1).]

Edmunds : Tenants are entitled only to what they contract for or to that which the statute obtains for them. The Housing Act, 1936, ss. 9-12, shows the standard of repair which is required. There was no ground for holding that the decision of the judge was wrong. In the present case, the damage was too remote to constitute a cause of action.

Lever, in reply: If a tenant can obtain ventilation through a window only at the risk of serious injury, the premises are not reasonably fit for human habitation.

MacKinnon, L.J.: The plaintiff was tenant under the defendant corporation of a small house which has two bedrooms upstairs. An accident happened to her in these circumstances. In Feb., 1940, the left-hand upper sash-cord of one of the bedroom windows broke. It is said that, as a result, the other cord stuck. I suspect that that means that the upper portion of the window, being held up only on one side, got a little out of the rectangular, and was inclined to stick if one tried to pull it down. Both cords of the bottom half of the window, so far as we know, remained all right. The judge has found that, after the breaking of this one upper cord, the plaintiff told the rent collector of the defendants that it had broken, and asked to have it repaired. She complained, of course, of the one which had broken. There is no evidence as to the age or condition of the other of the two upper cords, and no suggestion that the plaintiff gave any warning to the rent collector that that was in a frail or weakened condition. Following upon her complaint, on Apr. 3, when she was cleaning the window, the cord on the other side of the upper part of the window broke, with the result that that part of the window fell down, caught her hand between the two parts of the window, and caused her injury. Those being the facts, the plaintiff sued the defendants for damages caused to her by their breach of some legal obligation to her. So far as a contract of tenancy existed, there was no evidence of the terms on which she had originally become a tenant of theirs, which was said to have been some 30 years before, but a rent book dated 1940-41, having upon the back of it "Conditions of Tenancy," was put in, and was apparently treated as representing the contractual terms under which she held this little house. The only material passages in that contract appear to be these:

> (13) The tenant must pay the cost of replacing any broken windows and of repairing any damage to the premises other than that arising from ordinary wear and tear, aircraft or the King's enemies, and fire (not caused through the wilful act or neglect of the tenant). (14) On the determination of the tenancy the tenant shall leave the house and gardens in good order and clean condition, and if at the end of the tenancy the house be found to be in a dirty condition the tenant shall pay the cost of cleansing the same. (15) The corporation shall be at liberty, by their agents, servants or workmen, to enter and inspect the state of repair of the premises at all reasonable hours of the day and to execute any repairs therein . . . (19) Any work which the tenant is liable to carry out under these conditions and which is neglected or left undone by him may be carried out by the corporation and the expenses thereof shall be repaid to them by the tenant.

If the mutual obligations of the tenant and the landlord were solely governed by those terms, it is to be observed that there is in those terms no covenant by the landlord to do any repairs at all. He is given liberty to do so, but he enters into no obligation to do so. If the contractual terms between them were only those to which I have referred, I should have thought it would have been impossible for the plaintiff to allege that the defendants were liable to pay her damages through their breach of any obligation to repair this sash-cord. However, the relationship of the parties and the liabilities of the defendants do not depend entirely upon that contract with the plaintiff, but are also to be found in the Housing Act, 1936, s. 2, which provides as follows.:

> (1) In any contract for letting for human habitation a house at a rent not exceeding (*a*) in the case of a house situate in the administrative county of London, £40; (*b*) in the case of a house situate elsewhere, £26 [this was a house of that character]; there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation . . .

That provision is a repetition *totidem verbis* of the Housing and Town Planning Act, 1909, s. 14, and the Housing Act, 1925, s. 1. There is a difference between the 1936 Act and the Acts of 1909 and 1925, in that the Act of 1936 does contain, as the others do not, a definition of what is meant by "reasonably fit for human habitation." That appears in sect. 188 (4), as follows:

> In determining for the purposes of this Act whether a house is fit for human habitation, regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of the provisions of any byelaws in operation in the district or of any enactment in any local Act in operation in the district dealing with the construction and drainage of new buildings and the laying out and construction of new streets or of the general standard of housing accommodation for working classes in the district.

In this particular case, the matter in question must be disrepair. I cannot think that the fracture of one sash-cord of a window can be said to be a sanitary defect. There was no evidence of any byelaws in operation in the district, nor of any enactment in any local Act, nor of the general standard of housing accommodation for the working-classes in this district, and, so far as this particular case is concerned, I do not know that a reference to those matters which are directed in sect. 188 (4) would be of any service. The whole question is whether the plaintiff can say that the failure of the defendants to send round and mend this piece of rope on one side of the window was a failure by the landlord to keep the house in all respects reasonably fit for human habitation. That obligation clearly cannot be an obligation to keep the house at all times in perfect repair. I imagine it must be a less onerous obligation than would be imposed by a covenant by a landlord to keep the premises in good and tenantable repair. In fact, the words "kept in all respects reasonably fit for human habitation" are not words of art taken from the usual provisions of covenants in leases. They are words almost of journalistic generality, and I find it extremely difficult to make up my mind as to whether it can possibly be said that a failure to put right one broken sash-cord can be treated as a breach of a statutory obligation to keep a house in all respects reasonably fit for human habitation having regard to the general standard of housing accommodation for working classes in the district, as to which I have no information whatever.

I think that it is an extremely difficult problem which the legislature provides for any judge, but, on the whole, I think that the judge was right in coming to the conclusion that this accident was not proved to be due to any failure by the defendants to keep the house in all respects reasonably fit for human habitation. Croom-Johnson, J., was to some extent influenced—I do not know whether he felt himself bound—by *Morgan* v. *Liverpool Corpn.* (1), a previous decision of this court on the Act of 1925, when Lord Hanworth, M.R., and Atkin and P. O. Lawrence, L.JJ., were sitting. The question there concerned a similar accident through the breaking of a sash-cord. The judge of the Court of Passage had given damages to the plaintiff. The appeal was allowed, upon the ground, approved by all of them, that the landlord in such a case could not be held liable, for no notice of the defect had been given to him. Incidentally, however, the three members of the court expressed their opinion as to what would be the result if such notice had been given, as it has been given in this case. Lord Hanworth, M.R., and P. O. Lawrence, L.J., were of the opinion that the defendants in that case would have escaped liability, P. O. Lawrence, L.J., expressing himself much more strongly to that effect than Lord Hanworth, M.R. On the other hand, Atkin, L.J., expressed an opinion in the contrary sense. The effect of that difference of opinion is to show, as I think, how very difficult it is to give a legal interpretation to these words of vague and unscientific usage. However, it is for the plaintiff to establish her case, and, on the whole, I come to the conclusion that she did not establish, in these circumstances, that the landlords failed to keep the premises reasonably fit for human habitation. That being so, I think that the appeal fails and must be dismissed.

Luxmoore, L.J.: This is, I think, a difficult case, and I confess that during the hearing of the appeal my mind fluctuated from time to time, but I have come to the conclusion that the appeal ought to be allowed on the main question—namely, the liability of the corporation to pay the plaintiff damages in respect of the serious injury she undoubtedly has suffered.

There is no dispute of fact, for none of the findings of the judge has been challenged in this court. The plaintiff is a woman of 64 years of age. For 35 years she has occupied, as the tenant of the corporation, a small house at Salford at a rental bringing the house within the provisions of the Housing Act, 1936, s. 2. The house has four rooms only—a sitting-room and a kitchen on the ground floor, and two bedrooms on the first floor, one in front and the other at the back of the house. The house is occupied by the plaintiff, her husband, and family. The precise terms upon which the house was originally let to the plaintiff are not in evidence, but the case proceeded on the footing that the conditions of letting applicable are those printed on the back of the rent book issued by the corporation for 1940-41. The material conditions are these:

> (1) The tenancy is weekly, from Saturday to Saturday, and is terminable on 7 clear days' notice in writing by either party. (13) The tenant must pay the cost of replacing any broken windows and of repairing any damage to the premises other than that arising from ordinary wear and tear, aircraft or the King's enemies, and fire (not caused through the wilful act or neglect of the tenant). (15) The corporation shall be at liberty, by their agents, servants or workmen, to enter and inspect the state of repair of the premises at all reasonable hours of the day and execute any repairs therein.

There is nothing in the conditions imposing any contractual liability on the corporation, as landlords, to do any repairs of any kind, but, since the house is, as I have already stated, within the provisions of the Housing Act, 1936, s.2, because it is the subject of a contract for letting for human habitation at a rental less than the limit stated in subsect. (1) (*b*) of that section, there is to be implied in that contract, by reason of the provisions of the section, an undertaking that the house will be kept by the landlord during the tenancy in all respects reasonably fit for human habitation. At some time at the end of Feb., 1940, or the beginning of Mar., 1940, the left-hand cord of the upper sash of the only window in the front bedroom broke. The plaintiff told the corporation's agent of this defect, and was told by him that the corporation would have the cord repaired. This was in accordance with the corporation's practice. The repair was not carried out, and the plaintiff reminded the corporation's agent of the fact some weeks later. The cord had not been repaired on Apr. 3, 1940, when the plaintiff, being anxious to clean the window, drew the upper sash down a few inches, and, in order to do the cleaning, placed her left hand on the top of the lower sash. While she was cleaning the top part of the window with her right hand, the remaining cord of the upper sash broke and the sash fell down in its groove so that both hands were jammed between the two sashes. The injuries caused were serious, and have affected the plaintiff's general health. The judge estimated the damages for the injury at £260, which included the sum of £10 for special damage, but he held that the corporation were under no liability in law to the plaintiff, and consequently dismissed her action with costs. The plaintiff appeals to this court on the ground of liability, and also on the ground that the amount of the damages fixed by the judge was totally inadequate.

The first question to be determined is that of law. If the corporation is to be held liable, it must be because the corporation is under a duty to repair the cords of the upper sash of the window in question by reason of the provisions of the Housing Act, 1936, to which I have already referred, for there is nothing in the conditions of tenancy set out on the back of the rent book which can be said to render the corporation liable to do this repair. Sect. 2 of the Act provides that there shall be implied in the plaintiff's tenancy agreement an undertaking that the house (and by subsect. (4) of that section the expression "house" is defined as including part of a house) will be kept by the landlord (the corporation) during the tenancy " in all respects reasonably fit for human habitation." Sect. 188 (4) of the Act provides what matters are to be considered in determining, for the purposes of the Act, whether or not a house is fit for human habitation. I need not read the subsection again, for it has already been read. There are, I understand, no byelaws in operation in the district, nor are there any local Acts dealing with the construction and drainage of new buildings or the laying out and construction of new streets which need be considered, and no such byelaws or local Acts were referred to in the court below or in this court, nor was there any evidence given of the general standard of housing accommodation for working classes in the district, but it seems plain that, in considering the question whether or not a house is in all respects fit for human habitation, it is necessary to consider the disrepair and sanitary defects alleged to exist. " Sanitary defects " are defined in sect. 188 (1) as including " lack of ventilation." I agree that at first blush it would seem extravagant to say that a house is not fit for human habitation because the cords supporting one of the sashes of one of the windows in the house are broken, or in such a state that they are likely to break at any moment. This may well be due to the tendency to connect the word " fit " or the words " unfit for human habitation " with a demolition order. However, I think that the idea is dissipated when it is recalled that the powers of the local authority and its predecessors under the Housing Act, 1936, are more usually directed to cases where the unfitness may be due to want of repair remediable at a reasonably small cost. It is to be observed that the duty imposed on the landlord by the Act is to keep the house, including a part of it, in all respects fit for human habitation, and that one of the essential matters by which its fitness for human habitation is to be ascertained is the existence or lack of ventilation. The usual method of providing ventilation for a room in a dwelling-house is by means of a window or windows, so constructed as to open or shut without danger to the person opening or shutting it or them. If a room, especially a bedroom, has only one window and that window cannot be opened or shut without danger to the person seeking to perform that operation, that room may, in my opinion, be said to be not fit for human habitation. If the house of which the room forms a part is within the provisions of the Housing Act, 1936, and the landlord has notice of these facts, in my judgment, he has failed to perform the implied undertaking to be read into the tenancy agreement with the tenant to keep a part of the house—namely, the room in question—in a condition fit for human habitation. The case is not free from authority, for Sir Francis Taylor, the presiding judge of the Liverpool Court of Passage, held in 1927 that the tenant of an industrial dwelling-house, which as regards rent came within the provisions of the Housing Act, 1925 (from which sect. 2 of the 1936 Act is directly derived), was entitled to recover damages from his landlord in respect of an accident suffered by him when the top sash of one of the windows which he was opening fell and seriously crushed his hand owing to the breaking of the sash-cord. The ground of that decision was the failure of the landlord to keep the house "in all respects reasonably fit for human habitation." There was no material want of repair other than that of the sash-cord. The case came by way of appeal to this court, and was heard and determined by Lord Hanworth, M.R., and Atkin and P. O. Lawrence, L.JJ. This court allowed the appeal, on the ground that it was a condition precedent to the liability of the landlord that notice should be given to him of what was out of repair, and that, as, in the case under consideration, the landlord had not received any notice of the particular want of repair, his liability to do the repairs had not arisen under the implied undertaking. All three members of the court were unanimous on this point, but there was a difference of judicial opinion on the question whether, if the landlord had notice that the sash-cord was defective, he would have been liable because the house could not be said to be in all respects reasonably fit for human habitation. Lord Hanworth, M.R., and P.O. Lawrence, L.J., expressed the view that the question should be answered in the negative, while Atkin, L.J., stated that in his opinion the answer should be in the affirmative. These opinions were *obiter*, and there is no decision binding on this court with regard to what is the proper answer to the question in this case—namely, whether or not the bedroom was in all respects reasonably fit for human habitation, having regard to the fact that, by reason of the breaking of one of the cords of the upper sash of its only window (a fact brought to the notice of the corporation) that window could not be opened without danger of personal injury. The material facts, except in regard to notice to the landlord, are substantially the same in both cases. Atkin, L.J., in dealing with the question of fitness for human habitation, said that the question was really one of fact, and [p. 145]:

> . . . while no one would say that the mere fact that one cord, or two cords for that matter, were broken necessarily put a house in a state in which it is unfit for human habitation, yet when you take into consideration the class of house and the people with whom you are dealing and the particular circumstances of the case you may be forced to a different conclusion.

He stated the standard which commended itself to him [p. 145]:

> . . . if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation.

He went on to say, at pp. 145, 146:

> It seems to me difficult to say that that house in that state is reasonably fit for human habitation, and if that rule was the correct test, I think that the facts here bring the case within such a definition. For this purpose it is not merely a question of a window falling with such weight as a window sash has; one might test it by reference to any other thing that might be in a house, as, for instance, a gas lamp or gas chandelier or a gas bracket or a curtain pole or any other thing which on being touched might fall and might cause serious injury; and if the curtain pole was in fact part of the structure of the house, as it is conceivable it might be, and it fell within the ordinary repairing duty of the person who has to repair, I think that case also might very well fall within such a case as this. There is another matter which has to be dealt with, and that is the question of health, to which I think the

learned judge properly attached importance. If a man is the owner of a house which has many rooms and many windows, it may very well be that the fact that one window will not open easily, or open at all, would be far from making that house in any respect unfit for human habitation. But when you are dealing with a working-class house with two bedrooms occupied in the ordinary way in which an industrial dwelling may be occupied, that is to say, by a man and his wife and children, it appears to me that the question whether or not the only window in one of the only two bedrooms is capable of being opened with reasonable facility, and if not opened will have to remain shut, has a bearing upon the question whether that room is reasonably fit for human habitation. A

With all respect to the contrary view expressed by LORD HANWORTH, M.R., and P. O. LAWRENCE, L.J., I prefer the reasoning of ATKIN, L.J., and have come to the conclusion that, since the corporation, having notice of the breaking of the sash-cord, failed to do the necessary repair, there has been a failure on its part to comply with the implied undertaking to keep the room in all respects reasonably fit for human habitation, and it is, therefore, liable in law to compensate the plaintiff for the injury suffered by reason of that failure. B C

As I have already said, CROOM-JOHNSON, J., fixed the damages at £260. Counsel for the plaintiff has argued that this sum should be varied, on the ground that it is wholly insufficient. I see no ground for interfering with the assessment. It seems to me that it is impossible to say that £260 is so inadequate as to constitute an injustice to the plaintiff and, that being so, there is no ground for interfering with the assessment. In the result I would allow the appeal, discharge the order of CROOM-JOHNSON, J., and direct that judgment should be entered for the plaintiff for £260 and costs here and in the court below. D

E

STABLE, J.: I agree with the judgment which has been delivered by MACKINNON, L.J. The point seems to me to be a short one, and incapable of much elaboration. The question which I have to ask myself, as I understand it, is whether the plaintiff has established that the part of the house with which we are concerned was in any respect not reasonably fit for human habitation. I find it impossible to say, in my judgment, that so trifling a disrepair as a broken or defective window-cord rendered that room or any part of that house not reasonably fit for human habitation. As regards the question of the amount of damages awarded, I agree with the observations of LUXMOORE, L.J. F G

MACKINNON, L.J.: I agree with what LUXMOORE, L.J., and STABLE, J., have said on the question of damages.

Appeal dismissed with costs in both courts. Leave to appeal to the House of Lords.

Solicitors: *J. H. Milner & Son*, agents for *Leslie M. Lever & Co.*, Manchester (for the appellant); *L. Bingham & Co.*, agents for *James Chapman & Co.*, Manchester (for the respondents). H

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

ictum of VISCOUNT SIMON, L.C., at
250, *applied.* REDMAN *v.* REDMAN.
948] 1 All E.R. 333.

Principle applied. BELLENDEN *v.*
SATTERTHWAITE. [1948] 1 All E.R.
343.

CHARLES OSENTON & CO. *v.* JOHNSTON.

[HOUSE OF LORDS (Viscount Simon, L.C., Viscount Maugham, Lord Wright and Lord Porter), **March 6, 7, May 9, 1941.**]

Practice and Procedure—Referring action to official referee—Claim based on negligence of professional man—Finality of official referee's decisions of fact—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 89 (*b*)—*Administration of Justice Act,* 1932 (*c.* 55), *s.* 1.

The plaintiff entrusted the defendants, the appellants in this appeal, with the development of certain land as a housing estate. He subsequently brought an action against them for breach of contract and for negligence in the performancee of the obligations thus undertaken. Negligence was alleged in many matters in connection with the lay-out of the estate, more especially in respect of the system of drainage recommended by them and the density of houses on the estate. The plaintiff applied for an order under the Supreme Court of Judicâture (Consolidation) Act, 1925, s. 89 (*b*) that the action be referred to an official referee, on the ground that it could not be conveniently tried by a judge. It was contended that, having regard to the number of plans to be examined, the technical nature of the questions involved, and the need for local investigation, the matter was a proper one for trial by an official referee. On the other hand it was contended that, as, under the Administration of Justice Act, 1932, s. 1, the official referee's decision on a question of fact would be final, it was not a proper exercise of the court's discretion to refer a case where charges of negligence were alleged against professional persons :—

HELD : an action in which the character or professional ability of a person is attacked, should not be referred to an official referee unless a prolonged examination of accounts or scientific or local investigation renders such a course necessary. The facts here did not show such an investigation to be necessary, and the exercise of the discretion of the court by which the action had been referred to an official referee was a wrongful exercise of that discretion which an appellate court ought to correct.

Decision of the Court of Appeal (SLESSER, L.J. and SINGLETON, J., CLAUSON, L.J., *dissenting*) ([1940] 2 All E.R. 503) *reversed.*

[**EDITORIAL NOTE.** The Administration of Justice Act, 1932, restricted the right of appeal from the decision of an official referee, making his finding upon any question of fact final. The House of Lords have here held that, where a charge of fraud or a charge of negligence is made against professional persons, this restriction on the right of appeal makes it a case which, *prima facie* should not be referred to an official referee. The serious nature of such a charge makes it desirable that the person charged should have the right to have the matter tried by a High Court judge with the opportunity of appeal on any question of fact which would then be available. Although the court has a discretion to refer such a case, the exercise of that discretion in the circumstances of the present case, was a wrongful exercise thereof and one which the appellate court ought to correct.

The House has expressed its views upon many matters arising under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89 (*b*) which are probably not necessary for the decision in this case. Though these matters are, therefore, strictly *obiter*, they are of considerable importance in a matter of practice, as this is, and among them the distinction between matters of account and the prolonged examination of documents or scientific or local investigation should be specially noted.

AS TO REFERRING ACTION TO OFFICIAL REFEREE, see HALSBURY, Hailsham Edn., Vol. 26, p. 87, para. 158 ; and FOR CASES, see DIGEST, Practice, pp. 567, 568, Nos. 2250-2253. See YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 622-625.]

Cases referred to:

(1) *Russell* v. *Russell* (1880), 14 Ch.D. 471; 2 Digest 368, *355*; 49 L.J. Ch. 268; 42 L.T. 112.
(2) *Leigh* v. *Brooks* (1877), 5 Ch.D. 592; 2 Digest 622, *2512*; 46 L.J. Ch. 344.
(3) *Hoch* v. *Boor* (1880), 49 L.J.Q.B. 665; 2 Digest 623, *2514*; 43 L.T. 425.
(4) *Evans* v. *Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.
(5) *Gardner* v. *Jay* (1885), 29 Ch.D. 50; Digest, Practice, 535, *1987*; 54 L.J.Ch. 762; 52 L.T. 395.
(6) *Ormerod* v. *Todmorden Joint Stock Mill Co., Ltd.* (1882), 8 Q.B.D. 664; 2 Digest 620, *2485*; 51 L.J.Q.B. 348; 46 L.T. 669.
(7) *Sacker* v. *Ragozine & Co.* (1881), 44 L.T. 308; 2 Digest 623, *2520*.
(8) *Dimmock* v. *Randall* (1889), 5 T.L.R. 358; 2 Digest 622, *2513*.
(9) *Russell & Co.* v. *Harris* (1891), 65 L.T. 752; 2 Digest 621, *2492*.

APPEAL by a firm of estate agents and surveyors from a judgment of the Court of Appeal (SLESSER and CLAUSON, L.JJ., and SINGLETON, J.), dated Apr. 15, 1940, and reported [1940] 2 All E.R. 503, where the facts are fully set out, affirming by a majority (CLAUSON, L.J., dissenting) an order made in chambers by TUCKER, J., on Feb. 13, 1940.

Gilbert Beyfus, K.C., and *Montague Berryman* for the appellants.

F. A. Sellers and *D. A. Scott Cairns* (for *J. P. Ashworth* on war service) for the respondent.

VISCOUNT SIMON, L.C.: My Lords, the appellants are a firm carrying on business at Guildford as estate agents and surveyors, who are being sued by the respondent for breach of contract and for negligence in their professional capacity. By his statement of claim, dated Nov. 14, 1939, the respondent alleges that he employed the appellants to prepare a scheme for the lay-out of certain properties which he had acquired with a view to their development as a housing estate, and that the appellants were negligent in that they failed to acquaint themselves with the levels of the property preliminary to the working out of a proper system of drainage, advised a system of cesspool drainage without considering whether this could be avoided by means of pumping sewage into a public sewer, provided for laying certain sewers which either could not be laid at all or could only be laid with disadvantage to the respondent, and did not plan so as to secure on the area the greatest number of houses permitted by the Housing Acts, with various cognate complaints. The defence, dated Feb. 2, 1940, put these allegations in issue, and thereupon the respondent applied to the master in chambers for the transfer of the trial of the cause to an official referee. The appellants resisted this application, but Master BALL thought it right to make the order, which was confirmed on appeal by the judge in chambers, TUCKER, J. The judge gave leave to appeal, and on Apr. 15 the matter came before the Court of

Appeal, consisting of Slesser and Clauson, L.JJ., and Singleton, J., Slesser, L.J., and Singleton, J., were for dismissing the appeal, but Clauson, L.J., in a dissenting judgment, to which I must make further reference, considered that the order of transfer to the official referee should not have been made. The Court of Appeal, therefore, by a majority dismissed the appellants' appeal, at the same time giving leave to appeal to this House.

The question turns on the interpretation and proper application of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89 (*b*). That section is in the following terms:

> In any cause or matter, other than a criminal proceeding by the Crown, (*a*) If all the parties interested who are not under disability consent; or (*b*) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers; or (*c*) If the question in dispute consists wholly or in part of matters of account; the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court.

Under this section, it is plain that two matters may arise. The first is the ambit of the jurisdiction which it confers upon the master or judge to make an order on an opposed application transferring the trial to an official referee. The second is the question of the considerations to be borne in mind, when jurisdiction to make the order exists, before the master or judge decides to exercise his discretion by making the order.

The appellants contend that the present action is one to which sect. 89 has no application at all. They further contend that, if there is any jurisdiction in the present case to make the order of transfer, the discretion to make it has not been properly exercised, and that the order, on that ground, ought not to be made. These two contentions must be examined in turn. First, as to the scope of para. (*b*). Several questions of interpretation arising under the paragraph were discussed in the course of the hearing before this House, and, though it is not necessary to form a final conclusion on all of them in order to decide this appeal, it is, I think, convenient, as we are dealing with a rule of procedure which is so frequently brought into play, to mention each of the points raised. (i) Does the relative clause "which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers" qualify both of the alternatives mentioned in para. (*b*) or does it only qualify the second of them—namely, "any scientific or local investigation"? In other words, does jurisdiction to make the order arise if the cause or matter requires "any prolonged examination of documents" without qualification, or is this test satisfied only when such prolonged examination cannot conveniently be made by the alternative methods mentioned? Having regard to the earlier history of this provision, and in particular to the contrast between the language of the repealed Supreme Court of Judicature Act, 1873, s. 57, and of the existing sect. 89 of the Act of 1925, I have formed the opinion that the relative clause qualifies both limbs of the paragraph. Sect. 57 of the Act of 1873 authorised transfer to an official referee in any cause or matter :

> . . . requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the court or a judge, conveniently be made before a jury, or conducted by the court through its other ordinary officers . . . .

The Act of 1925 dealt separately with the case in which the dispute consists wholly or in part of matters of account, and put this case in a separate para. (*c*), without adding the test of convenience. However, it left the " prolonged examination of documents " to be grouped in the same paragraph with " any scientific or local investigation," and it follows, I think, that the requirement of a prolonged examination of documents is not enough to give jurisdiction unless the test of convenience is also satisfied. (ii) What is the meaning of the final words in para. (*b*), " through its other ordinary officers " ? It is to be observed that the paragraph does not in express terms raise the question whether the matters to be examined or investigated could conveniently be dealt with by a judge without a jury. It is clear, I think, that the " other officers " of the court are not the High Court judges themselves. The reference must be to masters or registrars and similar functionaries. However, even though trial by a judge without a jury is not expressly referred to in para. (*b*), it is plain that, in exercising the discretion conferred by that paragraph, the master or judge must consider whether a hearing by a judge without a jury is not the proper course. One can imagine a case in which the probable length of the inquiry would be so great that, if the case were put in the non-jury list, it would be unlikely to secure the continuous attention of a judge, who would in due course be going on circuit, or perhaps would so block the disposal of other causes as to embarrass the due administration of justice. In considering whether to transfer a case to the official referee where all parties do not consent, the master or judge must always have fully in mind, and give due weight to, the alternative of trial by a judge alone. (iii) What do the words " scientific or local investigation " mean ? In many cases, the need for local trial is appropriately met by fixing the place of trial at assizes, but a very long investigation is, for practical reasons, not suited to this treatment, whereas an official referee can establish himself in the part of the country which is most convenient for the hearing, and carry the case to its conclusion, if necessary, even though it lasts a long time. There may be other reasons requiring a prolonged local investigation which would justify an order of transfer—e.g., if in a long case a large number of witnesses from the same locality is likely to be called. As for " scientific investigation," I do not consider that a sufficient reason for transfer would be found merely because technical questions were involved. A judge is just as fit to deal with scientific evidence as an official referee. For reasons which will immediately appear, it is not necessary in the present appeal for me to fix the limits of application of this phrase, and it would only hamper the working of the clause if in this or in other respects the House were to lay down precise limits. It may be that "investigation" is a word wide enough to cover something more than evidence given at the hearing. For instance, experiments conducted in the presence of the judge of fact may be included.

The appellants, as I have said, contend that the present case does not come within the section at all. The master had before him nothing but the pleadings, and an admission that "a number of plans will have to be laid before the court." They disputed that evidence about levels, or the *pros* and *cons* of cesspool drainage, would satisfy the requirement of "scientific investigation." Clauson, L.J., in his very powerful dissenting judgment, agreed with the appellants' contention. He said, at pp. 509, 510:

> From the pleadings, I should infer that the case would involve the consideration of detailed plans of the *locus*, and of lay-out and drainage plans, possibly some expert evidence as to the recognised way of dealing with such drainage problems as arose, and a careful consideration of the bearing on the matter of the rights and powers of the local authority in regard to such matters, and possibly also in regard to the Housing Acts.
>
> Without further evidence, I should, speaking for myself, be quite unable to hold that the plaintiff (who supports the order for a reference) had discharged the onus which lay on him of establishing that the action required a prolonged examination of documents or a scientific or local investigation which could not conveniently be conducted by the court through its ordinary officers. That the action might well last several days, and would thus be likely to hamper the progress of the non-jury list, I can well believe. If the matter rested with me, however, I should be prepared to hold that the plaintiff had failed to establish the existence of the conditions required by the relevant provisions of the Act before the matter can be compulsorily referred to an official referee, and on that ground I should allow the appeal.

If the decision in this appeal depended solely upon the question whether the pronouncement of Clauson, L.J., on this aspect of the case should be upheld, I should hesitate before I could reject the conclusion of Clauson, L.J., for, while no hard-and-fast line can be drawn so as to provide an automatic test for the application of the section, I do not myself see in the pleadings and in the admission as to plans sufficient prospect of prolonged examination of documents, or of scientific investigation, to lay a foundation for compulsory transfer. However, it is most undesirable to limit by unnecessary rulings the reasonable ambit of the work which official referees undertake and discharge so greatly to the public benefit and to the advantage of the due administration of justice, and it is unnecessary in this appeal to be so precise, because there is a second ground urged by the appellants, which, taken with the flimsiness of the material on which the order is founded, convinces me that the order should be reversed. This second ground is as to the exercise of the discretion to make the order, assuming that there was bare jurisdiction to do so. The appellants strenuously opposed a reference of the cause to an official referee, because their professional reputation is at stake in the action, and the Administration of Justice Act, 1932, s. 1, changes the previous law by providing that no decision of an official referee shall be called in question by appeal or otherwise, except in the case of a decision on a point of law. The respondent's counsel pointed out, with force and justice, that the impossibility of an appeal on fact from the official referee did not at all diminish the jurisdiction to transfer an action in a proper case to an official referee. That is true, but I cannot doubt that the circumstance is one to be weighed A in an application for transfer when the other party objects on this ground in a case involving more than financial considerations. The allegations here are not of incidental negligence by servants for whom the defendants must be regarded as responsible. What is involved is the professional reputation of the partners themselves. It has often been recognised B that, where a charge of fraud is involved, the transfer of the decision from the High Court to an arbitrator appointed under the terms of the contract may properly be resisted: *Russell* v. *Russell* (1). Similarly, the demand that, where fraud of a party is alleged, the case should be heard in the ordinary way rather than be transferred to an official referee has been C acceded to (*Leigh* v. *Brooks* (2)), unless, indeed, the case is of such a character that it cannot be properly dealt with without a prolonged examination of documents by this latter means: *Hoch* v. *Boor* (3). Negligence falls far short of fraud, but, nevertheless, if the appellants press the objection (as they do) based on the Administration of Justice D Act, 1932, I hold that the objection is relevant to the exercise of discretion under sect. 89, and ought, wherever reasonably possible, to be given full weight.

There remains the question whether, assuming that, in the circumstances of this case, TUCKER, J., had jurisdiction to make the order of reference, E his conclusion must stand, on the ground that it was reached in the exercise of his discretion, and that the exercise of such discretion should not be interfered with on appeal. So the respondent contends, while the appellants urge that, even if the discretion to make the order existed, it was wrongly exercised, in view of the gravity of the charges made against F them, the impossibility of appeal from an official referee's finding of fact, and the practicability of the case being tried before a judge without a jury. The law as to the reversal by a Court of Appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty which arises is due only to the application of well-settled G principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them; in a H different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. This matter was elaborately discussed in the decision of this House in *Evans* v. *Bartlam* (4), where the proposition was stated as follows by my noble and learned friend LORD WRIGHT, at p. 486 ([1937] 2 All E.R. at p. 654) :

> It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the judge had jurisdiction
> A and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus in *Gardner* v. *Jay* (5), BOWEN, L.J., in discussing the discretion of the judge as regards
> B mode of trial says [p. 58] : " That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed."

In all the circumstances, I reach the conclusion that, if there were jurisdiction to make this order, the making of it was not a legitimate
C exercise of discretion, which of course would not be disturbed on appeal, but was a wrongful exercise of the discretion, which it is the duty of this House to correct. I move that this appeal be allowed with costs here and below.

D VISCOUNT MAUGHAM : My Lords, the question before your Lordships is whether the Court of Appeal was right in affirming the order of TUCKER, J., ordering the action to be referred to one of the official referees of the Supreme Court. This question requires the consideration, first, of the circumstances in which the order for reference was made, and, secondly,
E of the question whether the case is one of a somewhat exceptional kind in which the Court of Appeal ought to have interfered with the order of the judge, though made in the exercise of his discretion, and should have set aside the order.

The order for reference was made under the Supreme Court of Judicature
F (Consolidation) Act, 1925, s. 89 (*b*), which I need not repeat. The court or a judge is thereby given a discretionary power, in certain defined circumstances, to order the whole cause or matter, or any question or issue of fact arising in it, to be tried before an official referee The relevant circumstance in this case, which is to be found in para. (*b*), is that the
G cause required prolonged examination of documents or some scientific or local investigation

> . . . which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers . . .

On the precise meaning of this somewhat cryptic section I cannot usefully
H add anything to that which has fallen from VISCOUNT SIMON, L.C., with which I completely agree. I have, however, had considerable doubt as to whether the respondent established that the conditions of para. (*b*) in the section were satisfied. High Court judges so constantly deal with cases involving no more prolonged examination of documents or any further local examination than the present case is likely to entail that I am inclined to the view that all that was established in this case was that

the hearing was likely to be rather a long one, and that alone is not a sufficient ground for referring the cause. However this may be, and while my own opinion on this point is that which CLAUSON, L.J., has forcibly expressed, I am content to dispose of the matter on the footing that the conditions required by the section had been established by a narrow margin.

It is unfortunate that we have not had the advantage of receiving any information as to the reasons which guided TUCKER, J., in affirming the decision of the experienced master, and the Court of Appeal was in the same position. There was considerable difference of opinion in that court, and the matter was twice argued. The appeal was finally dismissed, but CLAUSON, L.J., differed, and SINGLETON, J., stated very clearly that he would not have made the order, but did not think that the discretion of the judge ought to be interfered with. SLESSER, L.J., himself expressed no personal view as to the order being right, but thought it was not a case for interfering with the exercise of discretion by TUCKER, J.

My Lords, in my view this is a somewhat special case, and I think that it ought not to be regarded as an encouragement to litigants to appeal in ordinary cases from such an order as we are now considering. Your Lordships have carefully perused the pleadings, from which the fact emerges that the case is one which involves serious allegations of personal negligence, and in particular of gross dereliction of professional duty, against a firm of estate agents and surveyors. The vital importance of this circumstance arises from the fact that, since the Administration of Justice Act, 1932, came into force, no decision of an official referee can be called in question by appeal or otherwise except on a point of law. If the official referee should decide against the appellants, unless, indeed, he should wrongly decide a point of law, they will be helpless in the matter, and may have their professional reputation and prospects completely ruined.

Nothing is further from my thoughts than to suggest that the official referees now in office are likely to decide wrongly, but there is a well-known Latin adage, to be found, I think, in most Latin grammars, which truly states that every man is liable to err. The maxim is applicable to all persons, and even to the most eminent of judges. Whatever may have been the reasons of the legislature in so greatly curtailing in 1932 the right of appeal from an official referee—and I do not profess to appreciate them—it must be remembered, as the authorities show, that the question whether a cause should be referred is one which must be decided in the light of justice, equity and common sense as between the parties. A strong case should be made before litigants against whom serious charges of personal negligence have been alleged are deprived by order of a right to have the case tried by a High Court judge, with the very important consequence of depriving them of their right to appeal. I fully agree with what CLAUSON, L.J., has said on this point. In a case so important in its possible consequences to the defendants as the one we have before us, and trial before a High Court judge not presenting serious difficulties, they ought not, in my opinion, to be deprived of the right to correct, or to endeavour to correct, by an appeal an error into which the referee (like any other judge) may fall.

My Lords, I think that there are sufficient grounds in this case for thinking that due weight was not given by the judge to this aspect of the case, for, if it had been, I feel that his decision would not have been in favour of making the order of reference. It is true that the matter was one for the exercise of his discretion, but, with all respect, I have come to the conclusion that his discretion was exercised without giving sufficient consideration to the point I have mentioned and that the present order may result in injustice being done. The judgments delivered in your Lordships' House in *Evans* v. *Bartlam* (4), and I would refer particularly to that of my noble and learned friend Lord Wright, are sufficient to show that this House will not be departing in any degree from the rule or the practice in regard to appeals in cases where discretionary jurisdiction is involved by allowing the present appeal. I agree with the motion proposed by Viscount Simon, L.C.

Lord Wright: My Lords, this appeal raises a question which is always embarrassing to an appellate court—namely, whether it should reverse an order made by the judge on a matter of discretion. However, there is in general a statutory right of appeal from such orders, and, as Brett, L.J., wisely observed as long ago as 1882 in *Ormerod* v. *Todmorden Joint Stock Mill Co., Ltd.* (6), at p. 679:

> If we have the jurisdiction to review, it seems to me that the legislature places the discretion in this court on an appeal in the place of the discretion of the learned judge who this court thinks has not exercised his discretion rightly. This court lays down for itself the rule, which I think is the right one, that it will not exercise its own discretion unless it thinks the case is perfectly clear.

This House in *Evans* v. *Bartlam* (4) had to consider the problem and reached a similar conclusion. In the Court of Appeal in that case, the opinion had been expressed that the Court had no power to interfere with the exercise of the judge's discretion unless the court thought he had acted upon some wrong principle of law. Lord Atkin thus dealt with the matter at p. 480 ([1937] 2 All E.R. at p. 650):

> Appellate jurisdiction is always statutory; there is in the statute no restriction upon the jurisdiction of the Court of Appeal; and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it.

I think, however, it would be a mistaken meaning of the opinion of Lord Atkin to attach undue emphasis to the words " normally " and " will " in the passage I have quoted. No doubt the appellate tribunal has a simpler task if it sees that the judge has proceeded on a wrong view of the law, but Lord Atkin was clearly not intending to limit the appellate jurisdiction to cases of error in law by the judge. Indeed, strictly speaking, there is in such cases no true exercise of discretion. Nor did Lord Atkin use the word " will " as involving certainty, or even what is called moral certainty. The context, I think, shows that all he meant was " may "—that is, that there is a reasonable danger of injustice. This view of the meaning of Lord Atkin seems to me to be justified by his opinion as a whole and the opinions delivered by the other Lords in that appeal.

In the present case, though the order of the judge agreed with that of the master, there was considerable difference of opinion in the Court of Appeal. The appeal twice came before the court, as your Lordships were informed. It came first before Luxmoore and Goddard, L.JJ. As they appeared likely to differ, the appeal was again argued before a court differently constituted, composed of Slesser and Clauson, L.JJ., and Singleton, J. The appeal was then dismissed, Clauson, L.J., dissenting, but leave was given by the court to appeal to this House. It is clear from this difference of opinion that the case is one of difficulty. It is also one of great importance to the appellants, who are estate agents and surveyors and are personally charged in the action with professional neglect and incompetence. The order appealed from has referred the trial of the action to an official referee. Without any reflection on the capacity of the official referees, the appellants not unnaturally feel that a case of such importance and gravity entitles them to a trial before a judge of the High Court, but they rely on an even more serious objection. There is now no appeal from the findings of fact of an official referee. The appeal is limited by the Administration of Justice Act, 1932, s. 1 (1) (*a*), (*b*), to questions of law. The appellants claim that this is in itself a sufficient reason why the discretionary power to refer the case to an official referee, if it exists, should not be exercised. They also contend, however, that the jurisdiction to refer does not exist in this case, because the conditions postulated by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89, which confer on the court the discretion to refer, were not satisfied. In particular, they say that the case did not require within the meaning of the section any prolonged investigation of documents, nor did it require any scientific or local investigation which could not, in the opinion of the court or a judge, conveniently be made before a jury or conducted by the court through its ordinary officers. This contention involves the interpretation of the words of the section, and in particular of the words " scientific " or " local " investigation. I think all the words are used in a somewhat vague and general sense. They are not terms of art, nor are they to be too strictly construed. " Prolonged " involves practical questions of degree. " Documents " is a very general word. " Scientific investigation " is, in my opinion, wide enough to cover questions of the practical applications of science, though it imports a narrower idea than the word " technical " or the word " expert." It would not in general include a large proportion of technical or expert evidence, such as that of a handwriting expert or an expert stevedore, but, especially in modern days, it would cover a wide range of expert evidence if that is based on scientific knowledge, such as that of medical or surgical experts, engineering experts of many types or classes, and sanitary or chemical experts. I give these as mere instances of a term which I should construe widely. "Local," again, is a vague term, primarily no doubt applying to investigation of actual local conditions on the spot, but apt to cover any investigation of local conditions. Then the word "conveniently" is a word which affords a large scope for discretion.

This House have before them the same materials as were before the judge. The plaintiff alleged that he was developing a property near Guildford and instructed the defendants in their professional capacity to prepare a scheme for the lay-out of the property as a housing estate. He charged them in the statement of claim with negligence in various respects, in particular with failure to obtain a complete grid of levels of the property, which he alleged was essential to prepare a drainage scheme, and with negligence in recommending a scheme of cesspool drainage instead of making use of public sewers by means of pumping plant. There were also complaints as to negligence in the preparation of plans, with consequent expense and delay. The defendants were also charged with a failure to make the best use of the land so as to get into it the full number of houses which could be erected upon it. These samples sufficiently indicate the general nature of the claim, which *prima facie* appears to involve some examination of plans, investigation of levels and local conditions, and expert evidence, some of which might be of a scientific character. CLAUSON, L.J., in the Court of Appeal, was not satisfied that the respondent had sufficiently established the conditions postulated by the section. The onus was, he said, on the respondent to show with particularity what were the documents, how they required prolonged investigation, and what was the nature of the local or scientific investigation. I feel the force of this criticism, but I do not desire to decide the appeal on that point. Having regard to what I regard as the wide range and vague meaning of the conditions stated in the section, I am not prepared to hold that there was no material on which the judge could exercise his discretion, though the material was both scanty and doubtful.

That the material was both scanty and doubtful might in itself be in some circumstances a sufficient grouund for reviewing the exercise by the judge of the discretion, which is a judicial discretion, not to be exercised without adequate reasons, but I am not sure that in this case it could be said merely on that that the judge was clearly wrong. There is here, however, an objection which, to my mind, is decisive. The claim is one which charges professional men with very serious negligence or incompetence, or both, in their professional capacity. It is true that even charges of fraud, and *a fortiori* of professional neglect, have been referred in proper cases to official referees, who are judges of ability and who sit in open court. That this has been the occasional though perhaps exceptional, practice at least before 1932 is sufficiently familiar to anyone experienced in legal affairs. However, the serious objection taken by the appellants to the order in this case is based on the change made in the law by the Act of 1932 to which I have referred above. The appellants object that their professional reputation should not be left to the final A decision without appeal on the findings of fact of an official referee, however able and conscientious. The case must eventually depend largely, or almost entirely, on the facts found. If the case were heard before a judge in the High Court, there would be an appeal on fact as well as on law. There would be no appeal on fact from an official referee, B though the findings of fact in a case like this must almost certainly be most vital. Clauson, L.J., thus sums up the position of the judge who, since the Act of 1932 came into force, is asked to order a compulsory reference in a case to which sect. 89 applies. He said, at pp. 510, 511 :

> It is not for him a mere question of weighing up the comparative advantages of various modes of trial. He has to weigh up the advantages of a trial before an C official referee, such as that of providing a continuous, and, if necessary, local, and possibly earlier, hearing, and at the same time affording relief to a possibly over-crowded non-jury list, against the very serious circumstance that, in case of error of fact, the litigant will be without remedy. It may well be that in many cases, such as that of partnership and like accounts, where the errors, if any, are unlikely to be other than errors of *quantum* in regard to a few among many items, the circumstance that appeal on fact is excluded may be of comparatively small importance. Never- D theless, the circumstance must obviously be considered and weighed.

I agree with Clauson, L.J., in these views, and in his further conclusion that in this case the appellants are entitled to have the order reversed. Otherwise, in the words of Clauson, L.J., they are [p. 511] :

> . . . deprived of the protection against error to which they are by law entitled if the case comes before the normal tribunal of a High Court judge. E

The weight to be given to this consideration must obviously differ in particular cases, but it has to be carefully estimated wherever it is likely to be of serious moment, as it is in this case. It is true that the judge appears to have had this objection brought to his attention, but I am satisfied that he did not give it due weight. No doubt appeals on questions F of fact from official referees would be in many—or perhaps even most—cases futile and vexatious, but it is, I think, to be regretted that the Act of 1932 did not leave to the official referee or the Court of Appeal the power of granting leave to appeal on questions of fact in proper cases. This could now be effected by a simple amendment of the law. G

I think Singleton, J., who agreed with Slesser, L.J., in deciding that the appeal should be dismissed, would have come to a different conclusion but for the special reasons which he stated. He said expressly that he would not himself have made the order which was made by Tucker, J., and that he thought it was, on the whole, undesirable to H leave the appellants without any appeal on fact in a case involving many complications, even though it might appear that the case could be more conveniently tried before an official referee. His reasons for not acting upon this view seem to be that it was not a matter for the exercise of his discretion, but for the discretion of the judge. I think that that reason is not sound in law. I have already explained that, in my opinion, when the statute gives a right of appeal from an order made by a judge in exercise of his discretion and an appeal is taken, the discretion of the appellate court is substituted for that of the judge, as BRETT, L.J., pointed out in *Ormerod* v. *Todmorden Joint Stock Mill Co., Ltd.* (6), at p. 679. The responsibility of deciding is then placed on the appellate court. No doubt that court starts with the presumption that the judge has rightly exercised his discretion. It must be satisfied that the exercise was wrong. "Clearly satisfied" is the phrase used. If the court is said to be satisfied, however, it must mean that it is "clearly" satisfied. "Clearly" strictly adds nothing, though it is useful to emphasise the strength of the presumption in favour of the judge's order being right. The appellate court must not reverse the judge's decision on a mere "measuring cast," or on a bare balance. The mere idea of discretion involves room for choice and for differences of opinion. I do not, however, understand that SINGLETON, J., felt any doubt that he would not have made the same order as the judge made. Each had exactly the same materials before him. SINGLETON, J., was satisfied in his own mind—that is, "clearly" satisfied—what the order should have been. He should accordingly have assumed the responsibility, as CLAUSON, L.J., did, of acting upon that view. His other ground was based upon the words of LORD ATKIN in *Evans* v. *Bartlam* (4), at p. 480 ([1937] 2 All E.R. at p. 650), which I have quoted above, as constituting good reason for reversing the judge's decision: "the decision will result in injustice being done." SINGLETON, J., felt himself unable to say affirmatively that injustice would (i.e., would necessarily) result from the order. I think, as I have explained, that this is a misreading of what LORD ATKIN meant. A reasonable danger of injustice is, in my opinion, enough to justify review.

No doubt it is always a difficult and delicate matter for an appellate court to interfere with an order made by a judge in the exercise of his discretion, but in proper cases it is the duty of the appellate court to do so. I do not repeat what all their Lordships said on this matter in *Evans* v. *Bartlam* (4), nor refer again to the earlier authorities cited there. It is enough to say that in this case I agree that the appeal should be allowed.

LORD PORTER: My Lords, this is an appeal from a decision of the Court of Appeal affirming by a majority the decision of TUCKER, J., who in turn affirmed the decision of a King's Bench master. The appellants carry on business as estate agents and surveyors. In 1936, they were employed by the respondent to prepare a scheme for the lay-out of a certain property acquired, or to be acquired, by him. The respondent alleges that, in carrying out this employment, they were negligent in a number of respects. He complains of their scheme for drainage, of their delay in submitting plans, and of their failure to provide for the erection of as large a number of houses as the estate would hold. It is plain that the allegations constitute an attack upon the appellants' competence in their business, though no reflection is cast upon their honesty. Substantially, the appellants' defence is a denial of the negligence alleged, together with an explanation of their action in respect of some of the matters upon which the respondent relies.

After the delivery of the defence, the respondent applied to the master A for an order that the case should be tried before an official referee. The master acceded to the application, and his decision was upheld by TUCKER, J., who, however, gave leave to appeal. In the Court of Appeal, SLESSER, L.J., and SINGLETON, J., affirmed the order made, but CLAUSON, L.J., would have allowed the appeal. SINGLETON, J., however, expressed B the view that he would not himself have made the order, but considered that it was a matter for the judge's discretion, and he was not clearly satisfied that the decision was wrong.

The power to refer a case for trial to an official referee is now contained in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 89 (*b*), C which, so far as material, provides as follows:

> In any cause or matter, other than a criminal proceeding by the Crown . . . (*b*) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers . . . the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special D referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court.

The section is not very clearly expressed, but I will assume, without deciding, that it should be read as empowering the reference of any cause or matter where either a prolonged examination of documents is required E or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers is required.

In other words, I shall assume that the question of convenience only comes directly in issue where scientific or local investigation is required, F though a prolonged examination of documents itself almost certainly cannot conveniently be tried by a jury, and may not be tried with convenience by a judge alone or one of the ordinary officers of the court other than an official referee.

So considering the section—and I do so because it is the construction G most favourable to the respondent—the court has power to send a case for trial before an official referee under para. (*b*) only if a prolonged examination of documents, or a scientific or local investigation which cannot in its opinion conveniently be made before a jury or conducted by the court through its ordinary officers, is required. In such a case, however, H the court is not obliged to send the case for trial in this way. The word is "may," not "must," order it to be so tried.

The appellants took two points—namely, (i) that there was no evidence before the judge or Court of Appeal which gave them jurisdiction to refer, and (ii) that in any case the jurisdiction, if it existed, was wrongly exercised. Some question arose before your Lordships as to the meaning of the phrase "conducted by the court through its ordinary officers." On an examination of the Supreme Court of Judicature Act, 1873, ss. 55, 57, 77 (*seq.*), it appears plain that those words do not refer to trial by a judge alone. By sect. 58, official referees are deemed to be officers A of the court, and the other officers appear to be those specified in sects. 77 and 79, and include masters, registrars and associates. The sections treat the alternatives as being by jury (as, indeed, was the ordinary way of determining fact in a common law court in 1873) or "conducted through ordinary officers." An illustration of the latter would no doubt be the B taking of accounts before a master. Trial by a judge alone is not expressly provided for, but at the present time a trial so conducted is the usual method of trial, and must be borne in mind in considering the alternative to be chosen.

As to jurisdiction, the respondent relied upon all three grounds for C reference. There was, it was said, likely to be a prolonged examination of documents and both scientific and local investigation. I should be loath to hold that there was no evidence upon which such a contention could be founded. The documents which would require prolonged examination were said to be maps and plans of the ground. It appears D that the appellants had made two in the course of their employment, and we were told by counsel for the respondent that at the present time eight more had been prepared for the purpose of the trial, and some further might be necessary. There is, of course, no formal evidence to this effect, but in the ordinary course a master or judge is entitled in preliminary E matters to take into account statements by responsible representatives of the parties, and I should be unwilling to fetter their discretion in this respect. However, a tribunal is entitled to use its own judgment in deciding how much weight is to be attached to the facts so stated, and, in the present case, the only matters in respect of which it was suggested F plans would be required were to show the levels, the drainage system in force in the neighbourhood and the method of drainage suggested.

These seem to me simple matters, and, whether one regards "prolonged investigation" as including many plans or a close scrutiny of the plans produced, the investigation in the present case could at best not be greatly G prolonged. So also in the case of scientific and local investigation, I should doubt whether a simple consideration of levels, or the possibility that a "view" might assist the tribunal in arriving at a correct conclusion, was what was meant by those terms. However, in a sense, the consideration of the drainage scheme, and the possibility of adopting some other H method than that provided by the appellants, having regard to the levels and to the suggestion that the difficulty might be solved by pumping, may be regarded as scientific. The observations of BRETT and HOLKER, L.JJ., in *Ormerod* v. *Todmorden Joint Stock Mill Co., Ltd.* (6) are, I think, accurate and in point. BRETT, L.J., said, at p. 678:

> It seems to me that there was therefore just a sufficiency of scientific investigation in this matter to prevent us from saying the learned judge had no jurisdiction . . .

Later, Holker, L.J., said, at p. 684:

> If it was a case within this section it came within it very slightly indeed, and no great time could have been occupied in going into the investigations which were necessary.

My Lords, in this case, I am prepared to accept the view that there was some, though slight, evidence of, at any rate, two out of the three requisites.

Then should the case have been referred? No question of the power of your Lordships and of the Court of Appeal to review the order made was raised before the House. Indeed, the matter is settled by the decision in *Evans* v. *Bartlam* (4). I quote only from the opinion of Lord Atkin, at p. 480 ([1937] 2 All E.R. at p. 650):

> . . . I conceive it to be a mistake to hold, as Greer, L.J., seems to do, that the jurisdiction of the Court of Appeal on appeal from such an order is limited, so that, as Greer, L.J., said, at p. 209, the Court of Appeal "have no power to interfere with his exercise of discretion unless we think that he acted upon some wrong principle of law." Appellate jurisdiction is always statutory; there is in the statute no restriction upon the jurisdiction of the Court of Appeal, and, while the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet, if it sees that, on other grounds, the decision will result in injustice being done, it has both the power and the duty to remedy it.

It has been said often enough that an appellate court should not interfere in such cases with the discretion of a judge except in what they regard as a plain case. The appellants did not quarrel with this statement, and I think your Lordships are prepared to accept it. Had it not been that the personal reputation of the appellants' firm was at stake, it is possible that the order should stand. Even, indeed, in cases where fraud is alleged—and fraud is a much more serious allegation than incompetence—the trial may be referred to an official referee. *Hoch* v. *Boor* (3), *Sacker* v. *Ragozine & Co.* (7), *Dimmock* v. *Randall* (8) and *Russell & Co.* v. *Harris* (9), are all authorities to this effect.

The principle upon which these decisions rest is, as I understand it, that *prima facie* it is not a proper exercise of discretion to take the case away from a jury where a charge of fraud is involved, but, where the allegation of fraud is so mixed up with the merits of the case as regards matters of account and such like things that the two cannot be tried separately, then the whole matter may be referred to an official referee.

If the charge of fraud cannot be tried without a prolonged examination of accounts or a scientific or local investigation, then a reference may be justified. Unless this be the case, however, an order to refer will in most cases be so wrong an exercise of discretion as to induce the court to interfere. I would only add that the application of the principles adopted in the authorities cited above to individual cases may require some modification as a result of the enactment of the provisions of the Administration of Justice Act, 1932, s. 1, to which I refer below. Where the charge is not fraud but incompetence, the necessity for trial before a judge or judge and jury is no doubt less imperative, but *prima facie* in those circumstances also the case should not be transferred for trial before an official referee.

In the present instance, in my view, the evidence that the question at issue involves the consideration of matters comprehended within the wording of sect. 89 (*b*) of the Act of 1925 is of the slightest, and a scintilla of evidence is not enough, at any rate, in a case where the professional competence of the defendants is attacked. I should have come to this conclusion even before the passing of the Administration of Justice Act, 1932, s. 1 (1), which abolished the right of appeal from an official referee except upon a point of law. That provision, however, appears to me to strengthen the argument for retaining the case for trial before a judge or judge and jury. A litigant whose character or professional ability is attacked should not, unless there are strong reasons to the contrary, be deprived of his right to have the facts reviewed. In a case where discretion has to be exercised, inability to appeal on fact is one of the matters for consideration, and I see no reason for neglecting it. I should allow the appeal.

Solicitors: *Berrymans* (for the appellants); *Gregory Rowcliffe & Co.*, agents for *Gilbert H. White & Co.*, Guildford (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

J. WHARTON (SHIPPING), LTD. *v.* MORTLEMAN AND ANOTHER.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Stable, J.), **May 14, 1941.**]

Insurance—Marine insurance—War risks—Collision with requisitioned ship—Requisitioned ship proceeding to be used as transport.

The Brendonia was insured under one policy insuring against marine perils, and was insured under another policy against war risks. When the ship was at anchor in the Downs, she was struck by another ship on Sept. 11, 1939, and became a total loss. The second ship was one requisitioned by His Majesty's government on Sept. 3, 1939, and ordered to go to Southampton for orders. At the time of the collision, the second ship was proceeding to Southampton as ordered, and it was the intention of the government to employ her, after her arrival at Southampton for Army transport purposes. This intention of the government was not, however, communicated to the owners of the second ship. It was contended that the second ship was engaged in a warlike operation, and that the loss fell upon the underwriters of the war risks policy:—

HELD: the second ship was not engaged in a warlike operation, and the loss fell upon the underwriters of the policy insuring against marine perils.

Decision of VISCOUNT CALDECOTE, L.C.J., ([1941] 1 All E.R. 175) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal have confirmed the view taken by Viscount Caldecote, L.C.J., that the *dicta* in the *Petersham* and *Matiana* cases (8) do not cover the facts of this case.

As to Warlike Operations, see HALSBURY, Hailsham Edn., Vol. 18, pp. 316, 317, para 441; and for Cases, see DIGEST, Vol. 29, pp. 226-230, Nos. 1836-1861].

Cases referred to:

(1) *A.-G.* v. *Ard Coasters, Ltd., Liverpool & London War Risks Insurance Assocn., Ltd.* v. *SS.. Richard de Larrinaga Marine Underwriters,* [1921] 2 A.C. 141; 29 Digest 228, *1851*; 91 L.J.K.B. 31; 125 L.T. 548; *affg.* S.C. *sub nom. Richard de Larrinaga (Owners)* v. *Admiralty Comrs.,* [1920] 3 K.B. 65; *affg.* S.C. *sub nom. Ard Coasters, Ltd.* v. *R.* (1919), 35 T.L.R. 604; (1920), 36 T.L.R. 555.

(2) *Britain S.S. Co.* v. *R., Green* v. *British India Steam Navigation Co., British India Steam Navigation Co.* v. *Liverpool & London War Risks Insurance Assocn.,* [1921] 1 A.C. 99; 29 Digest 230, *1860*; 89 L.J.K.B. 881; 123 L.T. 721; *affg.,* [1919] 2 K.B. 670.

Appeal by the underwriter from a judgment of Viscount Caldecote, L.C.J., dated Dec. 10, 1940, and reported [1941] 1 All E.R. 175. The facts are fully set out in the judgment of MacKinnon, L.J.

Sir Robert Aske, K.C., and *Waldo W. Porges* for the appellant.

A. T. Miller, K.C., and *Patrick A. Devlin* for the first respondents, the British Marine Mutual Insurance Association, Ltd.

A. J. Hodgson for the second respondents J. Wharton (Shipping), Ltd.

Aske, K.C.: This case raises one of the few points left undecided in the numerous cases which arose out of the Great War. It has been held that a naval vessel proceeding to a point at which she would begin to enter upon warlike operations was actually engaged upon a warlike operation while proceeding to that point. In that case the warlike operation was held to include the getting to the point at which warlike operations began. In the present case the only point is whether or not the Alderpool was engaged in a warlike operation when she was on her way to the port of loading. Whenever a ship, either a merchant ship or a warship, is setting out upon a defined duty, the warlike operation begins when she sets out. The passage to the necessary point is as much a part of the warlike operations as is the carrying of troops or the carrying of military equipment. [Counsel referred to *A.-G.* v. *Ard Coasters, Ltd* (1) and *Britain S.S. Co.* v. *R.* (2).]

Miller, K.C.: The ship was proceeding as any ship does when going to a port at which she is to receive orders as to her future employment. It might have happened that, by the time the Alderpool reached Southampton, she would be no longer needed. The ship was an ordinary merchant ship proceeding from one port to another for orders. [Counsel referred to *A.-G.* v. *Ard Coasters, Ltd.* (1).]

MacKinnon, L.J.: In Sept., 1939, the Brendonia was proceeding from Goole to Fowey, in Cornwall, with a cargo of 390 tons of coal, and on the evening of Sept. 11 she had anchored for the night near the

Gull Buoy. While she was so anchored, a much larger steamer, the Alderpool, of over 4,000 tons, ran into her and sank her, and she was totally lost. In those circumstances, the plaintiffs, the owners of the Brendonia, conceived that they had a claim under their marine insurance policy, which was underwritten for some amount by the defendant Mortleman. That claim was defended upon the ground that the policy contained, the Institute Time Clauses, cl. 19, in the following terms:

> Warranteed free . . . from the consequences of hostilities or warlike operations.

Prima facie, upon the facts which I have stated, this was obviously a loss by perils of the sea, and it was for Mortleman to establish that he escaped liability for the loss by reason of that passage in cl. 19. He did so attempt to establish his immunity by the fact that the Alderpool was engaged, according to him, in a warlike operation.

The facts were that the Alderpool had been somewhere in the Tyne, and the master had received instructions that she was requisitioned by the Admiralty, whose orders were that she should proceed to Southampton for orders. She was proceeding to Southampton for orders in ballast, and, like the Brendonia, she was minded to anchor for the night somewhere in the neighbourhood of the same anchorage, but I think a little further off, near the North Goodwin Buoy, and it was while she was proceeding to that anchorage that she unfortunately ran into the Brendonia and sank her.

With those facts added—namely, that the Alderpool was proceeding in ballast to Southampton there to receive orders from her charterers—there would again appear to be very little reason for alleging that the Alderpool was engaged in a warlike operation, but one further additional fact which was relied upon was that it was the uncommunicated intention of the Admiralty, when the Alderpool did get to Southampton, to load upon her Army vehicles and some petrol for transport to Brest, where the British Army was waiting to use the cargo.

In those circumstances, the question arises whether the defendant Mortleman has established that the loss of the Brendonia—or, rather, that the collision of the Alderpool with the Brendonia and the sinking of the Brendonia—was a consequence of hostilities or warlike operations. Viscount Caldecote, L.C.J., held that it was not, and I think that he was perfectly right. For my part, I should be almost content to say that I agree with everything which was said by Viscount Caldecote, L.C.J., in his extremely careful judgment. The only arguments which counsel for the appellant could bring forward to suggest that the decision was wrong were some isolated passages containing expressions used by one or two of the members of the House of Lords when dealing with a totally different matter concerning warships. There are *dicta* to the effect that, when a warship is proceeding to the scene of warlike operations, although at the moment she is not actually engaged in them, none the less during that preliminary passage to the scene of warlike operations she is herself exercising a warlike operation. No doubt that is perfectly correct, but it seems to me to have no bearing upon this totally different question as regards this purely commercial vessel, which was engaged at the time of the disaster in question in a purely commercial and unwarlike operation, and I am quite satisfied that, if the authors of those *dicta* to which I have referred had had this particular problem brought to their attention, and if they had been asked whether they would come to the same conclusion in such a case, they would readily, and with some asperity perhaps, have said that that was a totally illegitimate extension of anything which they intended to say, and a quite improper inference.

I think that the fact remains that, since the only conceivable connection which the Alderpool had with a warlike operation at the moment when she ran down the Brendonia was that the Admiralty had an uncommunicated intention of using her at a later stage in her history on a warlike operation, it is impossible to say that that fact renders that which the Alderpool was doing on this night the carrying out of a warlike operation. I think that the decision of Viscount Caldecote, L.C.J., and his reasoning, were perfectly sound and correct, and that no other result was possible upon those facts. In the result, I think that the appeal fails, and must be dismissed with costs.

Luxmoore, L.J.: I agree that the appeal should be dismissed, for the reasons stated by Viscount Caldecote, L.C.J., and by MacKinnon, L.J.

Stable, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Ince, Roscoe, Wilson & Glover* (for the appellant); *J. A. & H. E. Farnfield* (for the first respondents); *Thomas Cooper & Co.* (for the second respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re WOODHOUSE, PUBLIC TRUSTEE *v.* WOODHOUSE.

[CHANCERY DIVISION (Simonds, J.), **May 7, 1941.**]

Trusts—Rule in re Chesterfield's Trusts—Applicable only to personalty.

The testator possessed at his death certain reversionary interests in real estate which arose under two settlements. On the death of the tenants for life, these interests became vested in those entitled under the residuary trusts of his will. The real estate consisted of perpetual rent charges and a freehold house, and the trustees, who had full power to postpone sale, had not considered it necessary to sell. It was contended by the executors of the deceased tenants for life that some apportionment should be made as between the tenants for life and the persons in whom the reversion was now vested in accordance with the rule in *Re Chesterfield's Trusts* (1) :—

HELD : The rule in *Re Chesterfield's Trusts* (1) does not apply to realty, and no apportionment should be made.

[**EDITORIAL NOTE.** It has long been decided that the rule in *Howe* v. *Dartmouth* (2) applies only to personalty, but it has never been expressly decided that the rule in *Re Chesterfield's Trusts* (1) is so limited. The two rules are in fact complementary, the former safeguarding the interests of the remaindermen where they might be prejudiced by the payment of the whole of the actual income to the tenant for life, and the latter safeguarding those of the tenant for life in cases where remaindermen might reap all the benefit of reversionary interests which did not happen to fall into possession during the lifetime of the tenant for life. It would, therefore, be inequitable that one should be applied to realty if the other did not also apply to property of that nature, and, it having been long settled that the former rule had no application to realty, it is here held that the latter rule applies only to personalty.

AS TO RIGHTS IN REVERSIONARY AND WASTING PROPERTY, see HALSBURY, Hailsham Edn., Vol. 33, pp. 117-121, Paras. 207, 208 ; and FOR CASES, see DIGEST, Vol. 20, pp. 368-370, Nos. 1062-1074.]

Cases referred to :

(1) *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch.D. 643 ; 20 Digest 368, *1065*; 52 L.J.Ch. 958 ; 49 L.T. 261.

(2) *Howe* v. *Dartmouth (Earl), Howe* v. *Aylesbury (Countess)* (1802), 7 Ves. 137 ; 40 Digest 672, *2090*.

(3) *Casamajor* v. *Strode* (1809), 19 Ves. 390, n. ; 20 Digest 376, *1134*.

(4) *Re Searle, Searle* v. *Baker*, [1900] 2 Ch. 829 ; 20 Digest 377, *1139* ; 83 L.T. 364 ; *sub nom. Re Searle's Settlement Trusts*, 69 L.J.Ch. 712.

(5) *Re Van Straubenzee, Boustead* v. *Cooper*, [1901] 2 Ch. 779 ; 40 Digest 523, *683* ; 70 L.J.Ch. 825 ; 85 L.T. 541.

ADJOURNED SUMMONS to determine whether certain reversionary real estate should be subject to apportionment as between the estate of the tenants for life and those interested in the reversion.

H. Rose for the plaintiff.

R. F. Roxburgh, K.C., and *Sir Norman Touche* (for *Harold Brown* on war service) for the defendants, the residuary legatees.

H. B. Vaisey, K.C., and *J. M. Easton* for the defendants, the executors of the tenants for life.

SIMONDS, J. : The testator, Samuel Thomson Woodhouse, made his will on Dec. 22, 1910. He thereby devised and bequeathed all his real estate of every tenure and all his personal estate upon trust for sale. He gave his trustees the fullest power and discretion to postpone the sale and conversion of any part of his property, and he directed his trustees to hold his residuary real and personal estate :

> . . . including all property not sold or converted and the proceeds of the sale and A
> conversion of such part of my residuary real and personal estate as has for the time being been so sold or converted and all moneys investments and property for the time being representing my residuary estate (all of which are hereinafter referred to as my residuary estate) [upon certain trusts].

Those trusts were in effect to pay one moiety of the income of his residuary estate to his wife during her life, and after her death upon trust for his B
children, and, in default of children, upon trust to divide the same into six shares and hold them for the benefit of certain other of his relatives, and he directed his trustees to pay the income of the other moiety of his residuary estate to his sister, Jane Emilie Woodhouse, during her life, and after her death to hold that moiety upon trust to divide the income C
into six shares which were to be held on certain trusts, again for the benefit of his relatives. The testator died on Jan. 19, 1912, possessed of certain reversionary interests which arose in this way. He had made two separate settlements on Dec. 1, 1909. By the first, which was a marriage settlement, he had settled certain perpetual rentcharges of the annual D
value of £500 or thereabouts and a certain freehold house upon trust for his wife for life, and, after her death, upon certain trusts which did not take effect, and, subject thereto, upon an ultimate trust in his own favour. It was that ultimate trust in his own favour which, subject only to the life interest of his widow, he possessed at the date of his death. E
By the second settlement, a voluntary settlement dated Dec. 1, 1909, he had settled certain perpetual rentcharges of the annual value of £200 or thereabouts upon trust for his sister, Jane Emilie Woodhouse, for her life, with a reversion in his own favour. That was the other reversionary interest of which he F
was possessed at his death. His widow survived him, and died on Dec. 19, 1939. His sister also survived him, and died on Sept. 21, 1940. There was other estate of considerable value besides the reversionary interests which became subject to the trusts of the testator's will concerning his residuary estate. The trustees did not sell either of the G
reversionary interests, and it is quite clear from the evidence before the court that at no time did they consider it their duty to sell. It is perhaps not surprising that the duty of sale escaped their notice altogether. At any rate, it is clear that they did not consider that it was their duty to sell, and naturally they did not consider whether or not, in exercise H
of the discretionary power of postponing sale, they should postpone the exercise of that duty of sale. Thus the matter comes before the court in this way. Up to the time of the death of the tenants for life of the moieties of the residue, no question of sale had ever arisen. The question of discretion equally had never been considered, and now a claim is put forward on behalf of the representatives of the tenants

for life that the rule known as the rule in *Re Chesterfield's Trusts* (1) ought to be applied and that there ought to be some apportionment of the rentcharges or their value as between the tenants for life and the persons in whom the reversion is now vested under the will.

I have to consider first of all the question whether the rule in *Re Chesterfield's Trusts* (1) is applicable to real estate. That is an equitable rule established by this court in order to deal fairly in the administration of estates between persons having successive interests in a residuary estate subject to the trusts of the will. It is a rule of administration which, in my judgment, is to be regarded as complementary to other rules of administration established also for the purpose of doing justice as between persons entitled to successive interests. Those rules are established by such cases as *Howe* v. *Dartmouth* (*Earl*) (2), which established the rule that a tenant for life of residuary personal estate is not entitled to the whole of the income of such investments as are not authorised by the trusts of the will. Equally, where personal estate is bequeathed upon trust for sale, in the absence of express provision, the tenant for life again is not entitled to the whole of the income of the investments which are retained unsold and which are unauthorised by the terms of the will. It is, in my judgment, as a complementary rule to those rules that the rule in *Re Chesterfield's Trusts* (1) has been established, whereby the tenant for life gets some benefit from the reversionary interest forming part of the testator's estate which, in the interests of proper management of the estate as a whole, is not immediately realised. If the reversionary interest is not sold, then it is right that the tenant for life should get some benefit, for, if it were sold, he would get the income of the proceeds of sale, and so, just as the reversioner is benefited by the earlier rules which I have mentioned—for instance, the rule in *Howe* v. *Dartmouth* (*Earl*) (2) —so the tenant for life is benefited by the application of the rule established in *Re Chesterfield's Trusts* (1). It is noteworthy that those are rules which have been established only in regard to personal estate. It is, I think, beyond controversy that the rule in *Howe* v. *Dartmouth* (*Earl*) (2) is not applicable to residuary real estate. Equally, where real estate is devised upon trust for sale, the tenant for life is entitled to the whole of the net rents and profits until sale. That was established long ago in *Casamajor* v. *Strode* (3). In no case in the books, so far as I am aware, has the rule in *Re Chesterfield's Trusts* (1) been applied to the case of real estate, and, although it may be correct to say that there are only *dicta* in regard to its application to real estate, I think that they are *dicta* which I ought not to disregard.

In *Re Searle, Searle* v. *Baker* (4), KEKEWICH, J., said, at p. 832 :

> The question in this case really is whether the testator's widow is entitled to the rents and profits until sale of the real estate which was devised upon trust for sale, and to pay her the income of the proceeds during her life, with a power to postpone the sale during her life at the discretion of the trustees. If she is so entitled, of course she is a tenant for life, and entitled to exercise the powers of a tenant for life under the Settled Land Act. Mr. Rolt's argument is based entirely on this—that the law is settled as regards personal estate that where there is a trust for conver-

> sion, and no specific gift to the tenant for life of the income of existing investments until conversion, the tenant for life is not entitled to the actual income, but to something else, and that there is no reason for any distinction between real estate and personal estate. I think that that argument is unsound. Why there should be that distinction between personal and real estate is not for me to inquire; but the distinction runs through many cases, which show that for many purposes real and personal estate must be considered on a different footing.

Then he refers to several cases, including *Casamajor* v. *Strode* (3), which I have already cited. In *Re Van Straubenzee, Boustead* v. *Cooper* (5), Cozens-Hardy, J., said, at p. 782:

> Now, so far as I am aware, the rule in *Howe* v. *Dartmouth* (*Earl*) (2) has never been applied except to a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession.

In both *Re Searle, Searle* v. *Baker* (4) and in *Re Van Straubenzee, Boustead* v. *Cooper* (5), reference is made to the rule known as the rule in *Re Chesterfield's Trusts* (1), and I think that those cases are valuable as illustrating that, in the course of administration, a divergence exists between real and personal estate. If, therefore, I am right in thinking that the rule in *Re Chesterfield's Trusts* (1) is really to be regarded as complementary to the other rules, it seems to me clear that, if those rules do not apply to real estate, so also the rule in *Re Chesterfield's Trusts* (1) ought not to apply. I think that it may be tested in this way. As between tenant for life and reversioner, it would be manifestly unfair if the rule in *Re Chesterfield's Trusts* (1) did apply and the other rules did not. Upon the authorities, it is quite clear that the other rules do not apply to the case of real estate, and it would, therefore, be unfair that the rule in *Re Chesterfield's Trusts* (1) should apply.

I should add this. The view which I am taking as to the application of the rule to real estate is also the view taken in the last edition of Jarman on Wills, p. 1208, where, indeed, there is no express reference to *Re Chesterfield's Trusts* (1), but it is said:

> The rule [in *Howe* v. *Dartmouth* (*Earl*) (2)] as formulated by Lord Eldon only applies to residuary gifts of personal estate and it is generally assumed not to apply to real estate.

The same view is also taken by Gover on Capital and Income, where the rule in *Re Chesterfield's Trusts* (1) is in terms stated as a rule in regard to personal estate. I come to the conclusion, therefore, that the rule in *Re Chesterfield's Trusts* (1) has no application to the reversionary interests in realty which were comprised in the residuary estate of the testator.

Declaration accordingly.

Solicitors: *Woodcock, Ryland & Co.*, agents for *Brooks, Marshall, Moon & Co.*, Manchester (for the plaintiff); *Morecroft, Sproat & Killey*, Liverpool (for the residuary legatees), *Cunliffe & Airy*, agents for *Tatham, Worthington & Co.*, Manchester (for the executors of the tenants for life).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

LATILLA *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **April 28, 29, 1941.**]

Income Tax—Sur-tax—Avoidance of tax—Transfer of partnership interests to Rhodesian company—Power to enjoy income—Finance Act, 1936 (c. 34), *s*. 18.

The appellant's wife was one of five partners in a gold mine situated in Rhodesia. On the return to England in 1933 of Mrs. J., only one of the partners, M., continued to reside in Rhodesia. In order to look after the interests of the partners other than M., and to avoid liability to British income tax, a company, the L. Trust, Ltd., was formed in Rhodesia, and their interests were transferred to it. They received in exchange certain shares and non-interest-bearing debentures. The company carried on the business of mining in partnership with M. No dividends were paid by the company, but in each of the relevant years some of the debentures were redeemed. The appellant was assessed in respect of his wife's interest in the company under the Finance Act, 1936, s. 18 (1), on the ground that she had transferred assets to the company, "a person resident or domiciled out of the United Kingdom," and that by means of such transfer she had acquired rights by virtue of which she had power to enjoy income received by the company. It was also contended by the Revenue that the transfer was not effected for some purpose other than that of avoiding liability to taxation so as to bring it within the proviso to sect. 18 (1):—

HELD: (i) the term "income" in sect. 18 (1) includes trade profits, and the company was, therefore, in receipt of income within the meaning of the section.

(ii) the main purpose of the transaction was to avoid liability to British taxation.

[**EDITORIAL NOTE.** An interesting point arises in this case in regard to the interpretation to be placed upon the word "income" in the Finance Act, 1936, s. 18 (1). It had been decided in *Psalms & Hymns* (*Baptist*) *Trustees* v. *Whitwell* (1) and *R.* v. *Income Tax Special Comrs., Ex p. Shaftesbury Homes and Arethusa Training Ship* (2) that trade profits were not included in the phrase "yearly interest or other annual payment" in the Income Tax Act, 1842, s. 105. In that Act, however, these words had been contrasted with trade profits, whereas in the Finance Act, 1936, this is not so. The word "assets" is given a very wide meaning in sect. 18 (5) (*b*) of the Act, and it is reasonable, therefore, to construe "income" in an equally liberal fashion.

AS TO EXEMPTIONS FROM INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 79-81, paras. 161, 162; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.]

Cases referred to:

(1) *Psalms & Hymns* (*Baptist*) *Trustees* v. *Whitwell* (1890), 7 T.L.R. 164; 28 Digest 84, *479*; 3 Tax Cas. 7.

(2) *R.* v. *Income Tax Special Comrs., Ex p. Shaftesbury Homes and Arethusa Training Ship*, [1923] 1 K.B. 393; 28 Digest 84, *480*; 92 L.J.K.B. 152; 128 L.T. 463; 8 Tax Cas. 367.

CASE STATED under the Finance Act, 1927, s. 42 (7), the Income Tax Act, 1918, s. 149, and the Finance Act, 1936, s. 18, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The taxpayer appealed to the commissioners against an assessment to sur-tax for the year ending Apr. 5, 1936, and against assessments to income tax and sur-tax for the years ending Apr. 5, 1937, and Apr. 5, 1938, in respect of his wife's power to enjoy income of the Latjohn Trust, Ltd., a company formed in 1933 and registered under the laws of Southern Rhodesia. The interests of the taxpayer's wife and of three of the four other partners in the Golden Valley Mine were transferred to the Latjohn Trust, Ltd., the consideration being the issue of certain shares and non-interest-bearing debentures to the four partners whose interests were so transferred. The company carried on the business in partnership with Mack, the remaining partner and the only partner continuing to reside in Rhodesia. No dividends were declared by the Latjohn Trust, Ltd., but during the relevant years some of the debentures were redeemed. An accountant was called as a witness before the commissioners and gave the following evidence

> (*a*) he had been associated with the appellant and Lieutenant-Colonel Johnson for many years and advised them on business matters . . . (*c*) on Lieutenant-Colonel Johnson's return to England in 1933 it was essential that the interests of the partners other than Mack should be safeguarded, and this could best be done by the formation of the company with South African directors . . . (*e*) the company was not formed mainly with the object of avoiding British taxation ; (*f*) questions of British and Rhodesian taxation were considered on the formation of the company ; (*g*) when he advised the issue of non-interest-bearing debentures he had in mind both British and Rhodesian taxation ; (*h*) no dividends were declared by the company because it was desired to redeem the debentures ; and there was a standard instruction that as cash became available it should be utilised in the redemption of the debentures ; (*i*) he agreed that the non-remission of income to the United Kingdom avoided British taxation under the second rule of Sched.D. Case V : and he also agreed that this was pointed out to the parties as a secondary advantage of the scheme ; (*j*) he agreed that no double taxation in Rhodesia would have been incurred by the declaration of dividends by the company ; (*k*) since the Income Tax Ordinance of 1918 the company was liable to Rhodesian income tax on its profits. There was, as yet, no income tax upon dividends in Rhodesia but the taxation of dividends had been discussed there and this matter had to be considered in deciding whether debentures should be issued by the company as part consideration for the share of the business it acquired as aforesaid ; (*l*) the avoidance of British taxation was considered but it was not the main purpose of the formation of the company.

It was contended on behalf of the appellant (i) that no income became "payable" to the company within the meaning of the Finance Act, 1936, s. 18, in consequence of the transfer of assets to the company under the agreement for sale dated Mar. 20, 1933 ; (ii) that the company was carrying on business in partnership with Mack, and earned its income ; (iii) that the transfer of assets effected by the agreement of Mar. 20, 1933, was effected mainly for some purpose other than that of avoiding liability to taxation ; (iv) that the transfer was a *bona fide* commercial transaction, and not designed for the purpose of avoiding liability to taxation ; and (v) that a transfer of assets situate outside the United Kingdom does not fall within the Finance Act, 1936, s. 18. The Crown contended (i) that the transfer of assets effected by the agreement of Mar. 20, 1933, was a transfer of assets to a person resident out of the United Kingdom by individuals resident in the United Kingdom and fell within the provisions of the Finance Act, 1936, s. 18; (ii) that by virtue of the transfer income became payable to the company; (iii) that by reason of the transfer the appellant's wife had power to enjoy the income of the company; (iv) that the transfer was not effected mainly for a purpose other than that of avoiding taxation; and (v) that the transfer was not a *bona fide* commercial transaction, and was designed for the purpose of avoiding liability to taxation. The Commissioners held that the transfer of assets effected by the agreement of Mar. 20, 1933, was a transfer of assets within the terms of the Finance Act, 1936, s. 18, and that, by reason of the transfer, income became payable to the company, and they further held that the transfer in consideration of the issue of shares and non-interest-bearing debentures was effected mainly for the purpose of avoiding British taxation, and was not a *bona fide* commercial transaction. The assessments were, therefore, confirmed in principle.

J. Millard Tucker, K.C., and *Terence N. Donovan*, for the taxpayer.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the Inland Revenue.

LAWRENCE, J.: The questions in this case are, first, whether, in the circumstances, there has been a transfer of assets by virtue whereof, or in consequence whereof, income becomes payable to persons resident or domiciled out of the United Kingdom, and, secondly, whether there was evidence upon which the commissioners were entitled to come to the conclusion that they were not satisfied that the transfer in question was effected mainly for some purpose other than that of avoiding liability to taxation.

The facts are substantially as follows. Some 25 years ago, the appellant's wife, a Mrs. Johnson, and one Mack acquired in partnership in third shares a gold mine in South Africa called the Golden Valley Mine, for which they paid £10,000 on the liquidation of the Golden Valley Mine Co., Ltd. At a later date, the appellant's wife gave one-third of her one-third interest in the mine to each of her two daughters, Mrs. Edith Mayo and Miss Gwen Latilla (now Mrs. Campbell). The mine was worked on behalf of the partnership until 1933. In 1933, Colonel Johnson, the husband of Mrs. Johnson, who had up to that time been resident in Rhodesia where the mine was, had to come back to England, and it was then considered desirable that the arrangements should be altered, and that there should be somebody in Rhodesia besides Mack who should look after the interests of the appellant's wife and Mrs. Johnson. Accordingly, the transfer in question was made by an agreement, dated Mar. 20, 1933, whereby the appellant's wife, Mrs. Johnson, Mrs. Mayo and Mrs. Campbell transferred their interests in the mine to a company called Latjohn Trust, Ltd., which had been formed for the purpose of entering into this agreement. The consideration which the transferors received for the transfer was 10,000 £1 ordinary shares and

£250,000 of non-interest-bearing debentures. No dividend has ever been declared upon the ordinary shares, but certain non-interest-bearing debentures have been redeemed in the years in question. In 1935, such debentures to the value of £24,000 in 1936 to the value of £22,500 and in 1937 to the value of £20,000, were redeemed. In addition to the proof of these facts, an accountant was called who gave evidence as to the reasons why this arrangement had been made.

The special commissioners decided that there had been a transfer of assets by virtue or in consequence whereof income became payable to Latjohn Trust, Ltd., persons resident or domiciled out of the United Kingdom, and that it was for the purpose of avoidance by the appellant, who was ordinarily resident in the United Kingdom, of his liability to income tax, and they held that the appellant had not satisfied them that the transfer was effected mainly for some purpose other than that of avoiding liability to taxation within the meaning of the proviso to the Finance Act, 1936, s. 18 (1).

From this decision the taxpayer appeals, and counsel on his behalf argues that, under the transfer, which he admits took place, income did not become payable to Latjohn Trust, Ltd., within the meaning of sect. 18. He admits also that the appellant had power through his wife to enjoy the income within the meaning of sect. 18, but he contends that the income did not become payable within the meaning of that section to Latjohn Trust, Ltd. He relies principally upon *Psalms & Hymns* (*Baptist*) *Trustees* v. *Whitwell* (1), where it was held that trading profits which were made by the trustees in question were not yearly interest or other annual payments within the meaning of the Income Tax Act, 1842, s. 105, and *R.* v. *Income Tax Special Comrs., Ex p. Shaftesbury Homes & Arethusa Training Ship* (2), where a testator had bequeathed to trustees a business the profits of which were by his will to be paid to the charitable institution, the Shaftesbury Homes, and it was there held that the payment of such profits to the Shaftesbury Homes was an annual payment under sect. 105, on the ground that the Shaftesbury Homes did not make the profits themselves, but had them paid to them by the trustees, and that, therefore, the case was distinguishable from *Psalms & Hymns* (*Baptist*) *Trustees* v. *Whitwell* (1).

The argument of counsel for the taxpayer is that trade profits made by a person cannot be said to be payable to him, nor can trade profits made by a partnership be said to be payable to one of the partners. He says that, if the Income Tax Act, 1936, had intended to strike at trade profits, the words used would have been "income arising to persons resident or domiciled out of the United Kingdom," and he says that the words "income becomes payable to persons resident out of the United Kingdom" are totally inapplicable to trade profits which are made by such persons. Upon the other point, he contended that the commissioners could not reasonably have come to the conclusion that they were not satisfied that the transfer was effected mainly for some purpose other than that of avoiding liability to taxation. The words in which they expressed their decision upon this point were these:

> We further held that the said transfer for shares and non-interest-bearing-debentures was effected mainly for the purpose of avoiding British taxation and was not a *bona fide* commercial transaction.

A These words, said counsel for the taxpayer, indicated some error of law. I will deal with the second point first. In my opinion, there was evidence upon which the commissioners might come to the conclusion to which they came, and, in my opinion, there is nothing in the words which they used to indicate that they were in any legal error. On the
B first point, it appears to me that it is one thing to say that trade profits are not yearly interest or other annual payments under sect. 105 of the Act of 1842, and it is quite another thing, when an Act to prevent the evasion of tax refers expressly to income which, by virtue of transfer of assets, becomes payable to A but remains capable of enjoyment by
C B, to say that it was intended to exclude all income from trade profits. One finds the words "assets" used in the widest terms in the Act of 1936. They produce income. To whom, then, does the income become payable? Counsel for the taxpayer says that it becomes payable to no one, although in fact it is received abroad by Latjohn Trust, Ltd.,
D and paid over to the appellant's wife in England. I am unable to accept that argument, and it appears to me that the cases to which he has referred are distinguishable because they were decided upon different words in a different context, and were decisions upon the construction of an exemption clause in an Income Tax Act which exempted yearly
E interest or other annual payments, which words had been used in other parts of the Act in contradistinction to trade profits. It is, therefore, easy to understand why the courts held that the exemption was inapplicable to trade profits which had been distinguished from yearly interest and other annual payments in other parts of the statute. The Act of
F 1936 is dealing with quite a different topic. It is expressly for the purpose of preventing the avoidance of tax by individuals ordinarily resident in the United Kingdom. In a sense, it deals with income which becomes payable to one person, although the power to enjoy it remains with someone else. The words are, in my opinion, wide enough to cover
G the facts of the present case. I am of opinion, therefore, that the decision of the special commissioners was correct on both points, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Birkbeck, Julius, Edwards & Co.* (for the taxpayer);
H *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* D. K. BELCHER, *Barrister-at-Law*]

DEANE *v.* H. F. EDWARDS & CO., LTD.

[King's Bench Division (Wrottesley, J.), **April 23, 24, 25, 28, May 12, 1941.**]

Factories—Dangerous machinery—Fencing—Lift operated by ropes—Transmission machinery—Factories Act, 1937 (*c.* 67), *s.* 13.

Workmen's Compensation—Alternative remedies—Election between two remedies—Receipt of compensation—Father acting as son's agent—Request for payments of compensation to son—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29 (1).

The plaintiff was employed by the defendants as a garage hand, and in the course of his employment was instructed to take a motor vehicle from the ground floor by lift to the basement. The lift in question was operated by means of a rope loop set in motion by an electric motor, neither of which was fenced. In operating the lift, the plaintiff sustained injury. While he was in hospital, the defendants' insurance company paid him weekly sums of 15*s.* 6*d.*, securing his receipts on a form in which liability under the Workmen's Compensation Act, 1925, was admitted, but which contained a clause precluding any other kind of claim. Meanwhile, the plaintiff's father, as his agent, undertook correspondence with the defendants and their insurers, in the course of which he asked that payments on account of compensation should be paid directly to his son :—

Held : (i) the machinery used to operate the lift was " transmission machinery " within the Factories Act, 1937, s. 13, and ought, therefore, to have been fenced. The defendants were consequently negligent in not providing guards.

(ii) the plaintiff was precluded from succeeding in his claim for damages at common law, as he must be deemed to have exercised the option contained in the Workmen's Compensation Act, 1925, s. 29, to receive compensation under that Act, not by signing the receipts at a time when he was incapable of appreciating their contents, but through his father, acting as his agent.

[**EDITORIAL NOTE.** After deciding a short construction point on the Factories Act, 1937, the judge reviews the recent decisions upon the question arising under the Workmen's Compensation Act, 1925, s. 29 (1). After a careful consideration of the cases, he finds himself bound by the authorities to hold that the son has, in fact, exercised his option under that section by permitting his father to request the employers to pay him compensation under the Act. He reaches this conclusion despite his acceptance of the father's evidence that, in making that request, he did not know that he was exercising any option or that, in fact, there was any option to be exercised. The father thought the payments would be mere payments on account of a sum to be determined later.

As to Alternative Remedies, see HALSBURY, Hailsham Edn., Vol. 34, pp.961-969, paras. 1318-1328 ; and for Cases, see DIGEST, Vol. 34 pp. 490-492, Nos. 4063-4071 ; see also WILLIS'S WORKMEN'S COMPENSATION, 33rd Edn., pp. 521-527.

As to Transmission Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130 ; and for Cases, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Cases referred to :

(1) *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639 ; 34 Digest 495, *4087* ; 72 L.J.K.B. 857 ; 89 L.T. 318 ; 5 W.C.C. 65.

(2) *Perkins* v. *Stevenson (Hugh) & Sons, Ltd.*, [1940] 1 K.B. 56 ; [1939] 3 All E.R. 697 ; Digest Supp. ; 109 L.J.K.B. 1 ; 161 L.T. 149 ; 32 B.W.C.C. 181.

(3) *Unsworth* v. *Elder Dempster Lines, Ltd.*, [1940] 1 K.B. 658; [1940] 1 All E.R. 362; Digest Supp.; 162 L.T. 163.

(4) *Selwood* v. *Towneley Coal and Fireclay Co., Ltd.*, [1940] 1 K.B. 180; [1939] 4 All E.R. 34; Digest Supp.; 109 L.J.K.B. 8; 161 L.T. 323; 32 B.W.C.C. 238.

ACTION for damages for personal injuries suffered by the plaintiff in the course of his employment. The facts and arguments are fully set out in the judgment.

Gilbert J. Paull, K.C., and *F. Wishart* for the plaintiff.

G. Russell Vick, K.C., and *Montague L. Berryman* (for *Cyril Salmon* on war service) for the defendants.

WROTTESLEY, J.: The defendants are the owners of a garage in Tichfield Street which is partly on the ground floor and partly in the basement. Connecting these is a lift in which cars can be carried from one floor to the other. This lift was formerly operated by hand, and was designed for that purpose. A rope loop passed over a wheel, and, by hauling on the rope forming this loop, a person in the lift could raise or lower it. The wheel, by a series of pulleys and cog-wheels, finally operated on ropes attached to the lift. The lift was balanced against a counterweight, weighing as much as the lift or platform plus half the weight of an average car. Thus the platform would rise from the basement to the first floor automatically unless a car were on it. If there were a car on it, then the man would have to haul half the weight of an average car. Similarly, if a car were placed on the platform on the ground floor, the lift would descend automatically to the basement. If it were unloaded, then the man would have to haul half the weight of a car in order to lower the lift. The lift had a brake, but, in order to apply it, a man had to haul on a special rope, and only so long as he continued to haul on the rope would the brake hold. At some time or other it was thought advisable to apply an electric motor to this mechanical appliance. Doubtless the operation of it by hand involved hard hauling on the part of the man concerned. Thus, by means of a contrivance which I find it difficult to describe, but which is fairly clearly shown in the photographs put in evidence, an electric motor was introduced which turned a shaft, and a wheel on this shaft was made to revolve and to impart to the rope loop the motion formerly applied by manpower. No alterations appear to have been made to the braking system. The position was, therefore, that, in order to apply the power, a man switched on the motor and then pulled the rope. This caused the shaft and wheels which were revolved by the electric motor to come into contact with the rope loop, and so caused the rope loop to revolve. By pulling one rope, one caused the loop to revolve in one direction, and so to lower the lift or platform. By pulling the other rope, one caused the loop to revolve in the other direction, and so to raise the lift. This rope loop was transmission machinery as that phrase is used in the

Factories Act, 1937. The definition of that phrase in sect. 152 is as follows:

> " Transmission machinery " means every shaft, wheel, drum, pulley, system of fast and loose pulleys, coupling, clutch, driving-belt or other device by which the motion of a prime mover is transmitted to or received by any machine or appliance . . .

It was a driving belt or other device by which the motion of a prime mover was transmitted to the appliance. Nevertheless, it was not fenced securely, or at all, nor in such a position, nor of such construction as to be as safe as it would be if securely fenced. It therefore transgressed the Factories Act, 1937, s. 13, which provides as follows :

> (1) Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . .

It is alleged that the accident the subject of this action, by which the plaintiff lost most of the thumb of his right hand and a part of the top of one of the fingers, was due to this lack of fencing, and, if that is so, the injury to the plaintiff arose from a breach of the defendants' statutory duty. Therefore, it is necessary to examine the facts to see if this is true. The plaintiff—for the first time, as he says— was sent to work this lift alone. Until then, he had always gone with a companion. He was told to bring up a car from the basement. He got down in the lift safely, having switched on the power, and, having reached the basement, he had first of all to hold on to the rope which applied the brake, and, while holding on, to take the rope loop, now at rest, and wind it round two bars which stretch across the space where the rope loop hung. I will read his account of what happened, as I accept it. In evidence, the plaintiff said :

> When I got down to the basement, no one was there to help me. I held on to the brake rope and started putting the brake rope round the two bars in the basement. I mean the endless rope. The endless rope was not revolving. Then I felt my hand got caught in it. I tried to free it by pulling my hand away. I saw it was badly damaged. I got out of the lift and went upstairs. The thumb was then hanging in the palm of my hand. The hand was a mass of blood.

Then, in cross-examination, the plaintiff said :

> I was holding the brake rope in my left hand. My right hand was putting the hemp rope round two bars. The hemp rope was stationary, so far as I know, when I got hold of it. I tried to put it round the two iron bars.

There is no doubt, I think, that the plaintiff tried to perform the same manœuvre as he had seen his mates perform in order to anchor the lift in the basement. There is also, I think, no doubt that in doing so he slacked his hold on the brake rope. This would cause the rope loop to revolve, and by this means his thumb was caught and practically severed. If the appliance had complied with the Factories Act, 1937, s. 13, the rope loop would not have been unfenced, the primitive means of anchoring the lift described above would not have been available, and the accident could not have happened. The whole system of braking and transmission was, I think, such as to put an undue strain on the person operating the lift—at any rate after electric power had been installed. I do not think that the plaintiff was guilty of negligence in slackening his hold on the brake rope. His attention would naturally be diverted from the brake rope to the rope loop. In one second after he did so, the lift would be rising, and the rope travelling at the rate of 120 ft. per minute. In order to be reasonably safe, this lift would need two men to operate it and load it with a car or, alternatively, a brake, which once applied, would remain applied. I reject the suggestion that the plaintiff threw the rope over the revolving shaft which was over his head. Subject, therefore, to the other matters of defence raised in the case, the plaintiff is entitled to succeed. His special damage is properly put at £70, and I should assess the general damage at £250, a total sum of £320.

Another defence, however, is put forward. It is said that, by reason of the provisions of the Workmen's Compensation Act, 1925, s. 29, the plaintiff has forfeited the remedy which the common law affords him for the negligence of his employer, for, while he was in hospital on Dec. 11, 1939, (the accident having occurred on Nov. 18, 1939), he received two sums of 15*s.* 6*d.*, and signed a receipt which described this money as compensation due under the Workmen's Compensation Act, 1925. A week later, he received another sum of 15*s.* 6*d.*, and initialled the same receipt form. Moreover, the defendants rely on certain letters written by the plaintiff's father while his son was in hospital. They say that those letters were those of the plaintiff's agent, and that by them the plaintiff, through his father, asked for and received payment of compensation under the Workmen's Compensation Act, 1925. Let us look at sect. 29, the section in question. The marginal note is: "Remedies independently of Act against employer." Subsect. (1) provides as follows:

> When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

Here is an Act of Parliament which imposes even on careful and conscientious employers the duty of compensating workmen who come to grief in the course of their employment. It is not surprising that in such an Act one should find a section which apparently sets out to preserve intact the old common law rights of a workman who is so unfortunate as to come to grief through his employers' negligence or wilful act, while providing that a man is not to be compensated for his injuries twice over. If this is the object of sect. 29, the section is unfortunately worded, for it, at any rate, lends itself to the construction contended for by the defendants in this case. On this part of the case, the facts are these. On Dec. 11, 1939, the plaintiff, in bed and in hospital was seen by two young men, employees of the defendant company.

They brought him a form which the defendants' insurance company had sent to the defendant company in order that it might be signed by the plaintiff if he accepted the weekly sum appropriate to his case under the Workmen's Compensation Act, 1925. The form contains a carefully worded receipt form, calculated, *inter alia*, to put a stop to any subsequent claim by the recipient for anything but workmen's compensation, and reads as follows:

> Received of H. F. Edwards & Co. the sum of £1 11*s.* being the agreed and ascertained compensation due to me under the Workmen's Compensation Acts, 1925-1931, at the rate of 15*s.* 6*d.* for accident sustained whilst following my employment, such rate of compensation to be paid weekly during my total incapacity for work. (Signed) H. Deane.
>
> I have read this form of receipt to the claimant and witnessed his signature thereto. (Signed) H. Smith.

Then there follow some columns which are headed "Week ending," "£ s. d.," and "Received the following amounts," and the dates are filled in. There appear to be four dates filled in there. Against each of the first three dates—namely, Nov. 28, Dec. 5, and Dec. 12—there is a sum of 15*s.* 6*d.* entered, and on each line are the plaintiff's initials. Then there is one more entry of 15*s.* 6*d.*, on Dec. 19, 1939, again filled in. The manager of the defendant company was instructed by the insurance company to pay the weekly sum and to get this receipt signed. On this point, the form issued by the insurance company is eloquent. It is on the other part of the form, is addressed to H. F. Edwards & Co., and is as follows:

> We hereby authorise you to pay to your employee, H. Deane, the sum of 15*s.* 6*d.* weekly from and including Nov. 22, 1939, until further notice from us, or until the resumption of work, whichever first occurs.

That is signed for and on behalf of the Employers' Mutual Assurance Co. by Howells, the London manager. Then comes this passage:

> *Important.* In order to comply with the requirements of the Workmen's Compensation Acts, 1925-1931, we find it is necessary to issue authorities in the form herewith. Please do not make any payment without the signature of the injured employee. In cases where an employee is unable to attend personally to receive compensation, the form of receipt must be sent to, and signed by, that employee for the first payment. Receipts for subsequent payments may be signed by the representative of the injured employee.

Therefore, the manager sent Vernon Smith, an intelligent young man of 20 years of age employed in his office, to interview the plaintiff in hospital. The plaintiff, though educated at a public school, was not a particularly bright young man intellectually. I agree with the defendants' doctor in this. Four days before the interview, on Dec. 7, he had an operation by which the stump of his thumb was sewn or attached in some way to the wall of his stomach. The result was unfortunate, as the agreed medical report, dated Dec. 11, 1939, discloses:

> Your letter referring to Henry Deane has been given to me. He came in with a very badly damaged thumb: the distal phalanx being held on by the tendons only. This had therefore to be removed at the joint, but as much skin as possible was left. This did not cover the bone. Last week the thumb was buried in the abdominal wall, with a view to grafting skin over the end of the proximal phalanx. Unfortunately the result was an immediate cellulitis, which stretched down to the groin, with a foul discharge: he also ran a high temperature. He was treated therefore with

> M & B 693: the graft was not unsutured. His temperature has fallen and the cellulitis has decreased, although it is uncertain whether the graft will take now. He is, however, very miserable. The fate of the present attempt to graft his thumb is uncertain: but there is no cause for any real anxiety over his general condition.

After an unpleasant operation on Dec. 7, followed by blood-poisoning, a very high temperature, an extremely drastic drug, the plaintiff was interviewed by the two young men on Dec. 11 and confronted with a carefully prepared receipt, which he signed. I have no doubt that he would have signed anything at that time, and I am not surprised that his memory was hazy. This being a case where, admittedly, the plaintiff was not in need of cash, it seems unfortunate that it was paid. The only purpose to which the cash was put was to lie in an envelope on the table beside his bed. After weighing the evidence, and reading between the lines of the medical report, I am satisfied that the plaintiff was quite incapable of understanding what it was all about. I am quite sure that he did not accept the 31*s*. or the subsequent 15*s*. 6*d*. as money under the Workmen's Compensation Act, 1925. He could not be said to be in a position to make a choice, or to be able to judge what was in his interest or what was against it. At the same time, I wish to make it quite clear that, in the present state of the law and of the authorities, neither the defendant nor the insurance company did anything more than they might, in their own interests, be expected to do.

Unfortunately for the plaintiff, the matter does not end there. In his condition, it is not surprising that he was content that his father should act for him *vis-a-vis* his employers. He was content and told his father so, when the father said that he was seeing to things on the plaintiff's behalf. Accordingly, the father conducted a correspondence with the defendants on his son's behalf, and I will refer to the important letters in that correspondence. On Nov. 22, 1939, the plaintiff's father wrote a letter to the defendants in which he said:

> Will you please let me know if due notice of the accident has been given to your insurance company and advise me of any information you require in respect thereto. In the meanwhile, on his behalf, I beg to give you formal notice that he intends to claim compensation and/or damages in respect to injuries suffered by him whilst in your employ.

I may say that I am satisfied that the father did not mean in that case to draw any distinction between the Workmen's Compensation Act and damages for negligence. He was a consulting engineer, not a contracting engineer, and he was not familiar with the alternative exclusive remedies open to workmen. That letter written by the plaintiff's father was answered by the insurance company on Nov. 30 as follows:

> Your letter dated 22nd inst. enclosing a hospital certificate in respect of your son has been passed to us by his employers, Messrs. H. F. Edwards & Co., Ltd., for attention. We confirm that full details of the accident have been received and the employers have been instructed to make weekly payments of compensation, liability having been admitted under the Workmen's Compensation Act. You can receive payment upon application to the employers.

Next came a telephone conversation on Dec. 1, which is recorded in a letter dated Dec. 13. I will read the whole of that letter which is a letter from the father to the defendants :

> Will you please afford all facilities for the examination of the lift in which my son met with his accident to Mr. R. A. Smith with whom I have made arrangements on his behalf to get in touch with you as soon as possible with a view to making an inspection. Mr. Smith's address is 14, Victoria Street, S.W.1., and he will be getting in touch with you direct so as to arrange a time mutually convenient. On the 1st of this month Mr. Tilbury telephoned me to say that your insurance company had authorised payments on account by way of compensation at the rate of 15*s.* 6*d.* per week as from and including Nov. 22 and it was arranged that the amounts should be paid direct to my son. I understand from him that up to the present no such payments have been received so perhaps you will be good enough to look into the matter.

Therefore, on Dec. 1, the manager of the defendants had telephoned to the father of the plaintiff to say that the insurance company had authorised payments on account by way of compensation at the rate of 15*s.* 6*d.* per week, and the father is asking here that those payments may be made. It will be borne in mind that the father knew already about these payments. He had been told that they were payments under the Workmen's Compensation Act, 1925, liability having been admitted under that Act. He was, therefore, charged with knowledge of that. The defendants rely on these letters to bind and involve the plaintiff. They claim that the plaintiff, by his agent, requested them to pay such compensation under the Workmen's Compensation Act, 1925. They point out that the employer is not liable to pay compensation both independently of, and also under, the Act. In this case, therefore, the employers, the defendants, having paid altogether three sums of 15*s.* 6*d.* under the Act, are not liable also to pay the £300-odd which the court would have awarded but for sect. 29 of the Act. In other words, by the act of his agent, the plaintiff has exercised the option, for the agent, at any rate, knew what the payments were, and asked that they should be made.

It is obvious that the father, the agent, did know that the payments were made under the Act. His evidence on this point is as follows :

> I did not know you could not get both compensation and common law damages. I did not agree to anything. I agreed to accept compensation under whatever head it came. It was on account—on account, that is to say, of the final amount. I read the letter of Nov. 30, 1939. It is clear the payments would be under the Workmen's Compensation Act, but not that there was no other remedy. On Dec. 13, I was applying for the payments promised on Nov. 30, but I do not recollect Mr. Tilbury saying the payments were made under the Workmen's Compensation Act.

Then later on he said that it never occurred to him for a moment that 15*s.* 6*d.* was the only payment he would get, and that only for the period of his son's incapacity. Then he went on to say :—

> I bring the action because I am dissatisfied with the workmen's compensation awarded my son and because of other aspects in the case. There should be something awarded separately for the loss of the thumb and finger. I was prepared to take workmen's compensation payments on account, provided that did not bar an action. If I had known the law I would never have accepted the workmen's compensation payments. I never actually instructed my son to receive the money.

I accept that evidence. Deane was prepared to take workmen's compensation on account, provided that it did not bar an action. What is the result of his conduct? He was a consulting engineer, not a contracting engineer, and had no more knowledge of the Workmen's Compensation Act, 1925, than the ordinary layman. In particular, he had not the least suspicion that, by taking the 15*s.* 6*d.* payments, his son was forfeiting his common law rights to compensation for the permanent damage caused by his master's neglect. The letter of Dec. 13, in which the father pressed for the payments, is obviously directed to examining the lift in order to see whether or not an action for damages would lie. Nevertheless, it is said that the authorities on the proper construction of this section compel me to hold that this plaintiff, as the result of the letters which his father wrote and of the payments he received in hospital, has forfeited these rights, and is now confined to the quite inadequate remedy offered by the Workmen's Compensaiton Act, 1925. Counsel on either side have agreed on what are the relevant authorities in this case. First, there is *Oliver* v. *Nautilus Steam Shipping Co.* (1), where a badly scalded man, while still in hospital, wrote and informed his employers of the accident. He knew of the Act, and knew that a notice was necessary, in order that a claim under the Act might be made. He was visited by an agent of the insurance company, was paid four weeks' and four days' compensation, and signed a receipt for money due under the Workmen's Compensation Act, 1925. A few days later, he was warned by his trade union not to accept future payments except without prejudice. He acted on this advice. Subsequently he brought his action for damages for personal injuries, not against his employers, who were ship repairers, but against the steamship owners, who set up a defence under sect. 6 of the Act of 1897, the equivalent of sect. 29 of the present Act, which gave the workman an option to proceed against the person liable at law, or against his employer for compensation, but forbade proceedings against both. The real difficulty in the case arose, of course, through the first payment, which was not only made without reservation but was also received at the time on the terms of a receipt which described the payment as under the Workmen's Compensation Act:

> . . . on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897, in respect of the accident . . .

Those words are rather important. VAUGHAN WILLIAMS, L.J., in that case said that the fact that all payments after the first were accepted without prejudice made all the difference, especially as this was assented to by the person making the payments. ROMER, L.J., drew attention to the form of receipt, which, unlike the receipt in this case, was in no sense an admission of liability, and also to the fact that all later payments were received without prejudice, and that, accordingly, the first payment could not be looked at as "an isolated and fatal fact." STIRLING, L.J., also attached importance to the fact that payments after the first were made and assented to as being without prejudice. Before leaving that case, I note that VAUGHAN WILLIAMS, L.J., says that a receipt does not in itself create an estoppel of any sort or kind, and ROMER, L.J., is really, I think, saying something of the same kind when he says that after the receipt neither of the parties to it was absolutely bound by the payment or by the form of the receipt. Particularly is this true, I suppose, when one has a receipt carefully worded by the payer in advance and tendered for signature to a young man extremely ill and alone in hospital. Cases may very well occur in which a receipt might be held to constitute an estoppel forbidding a person from telling the truth on oath in the litigation by reason of something he had said or signed in a receipt. Short of estoppel, it might amount to a real hardship if a person who had had all the advantages to be obtained under the Workmen's Compensation Act, 1925, and so induced the employer to believe that no sort of blame was imputed to him, should make allegations of negligence long afterwards, when the employer had been lulled into a sense of security, and so failed to collect the necessary evidence to defend himself. Neither of these elements occurs in this case. The lesson to be drawn from that decision by me in deciding this case is that one payment, though coupled with a receipt explaining it to be under the Workmen's Compensation Act, 1925, but without admitting liability, does not amount to the exercise of an option by the workman under sect. 29 if subsequent payments are accepted only without prejudice, and if this is assented to by the person making the payment. In the case before me, the receipt was not indeterminate, but admitted liability, and there were no payments made and received without prejudice after the first two payments, upon which the defendants rely.

Then comes *Perkins* v. *Stevenson* (*Hugh*) *& Sons*, *Ltd.* (2), where the plaintiff claimed on four different occasions compensation under the Act, and on the fourth occasion claimed successfully. On the first payment, the workman signed a receipt claiming and electing to be paid under the Workmen's Compensation Act, 1925. The workman's solicitors, after eight payments, wrote claiming that the payments were without prejudice to his common law rights, and that further payments would be accepted without prejudice. The insurance company said that the election had been made. The matter was thus in dispute, yet the plaintiff went on receiving payments for 12 months and went on giving unqualified receipts. In that case, the Court of Appeal, upholding HILBERY, J., considered the effect of the section, not upon the case of a man who claimed compensation under the Act, but rather upon what was to happen where, quoting the words of SIR WILFRID GREENE, M.R., at p. 641 ([1939] 3 All E.R. at p. 702) :

> . . . the workman . . . having . . . no knowledge of his right of option nevertheless receives and puts into his pocket money paid in pursuance of that claim and in liquidation of the employer's statutory liability under the Act.

Then SIR WILFRID GREENE, M.R., said, at p. 66 ([1939] 3 All E.R. at p. 703) :

> . . . where the employer, in response to a claim under the Act, has made a payment of compensation under the Act, that payment discharges once and for ever, in whole or *pro tanto*, the statutory liability under the Act.

All the members of the court in that case seemed to think that, unless they decided as they did, the plaintiff might obtain both his rights under the Workmen's Compensation Act, 1925, and also damages at common law. This is not now, I think, thought to be sound reasoning, having regard to what GODDARD, L.J., pointed out in the case of *Unsworth* v. *Elder Dempster Lines, Ltd.* (3). The Court of Appeal really decided the case upon what they called the second limb of the section. This made it impossible that an employer who had, in respect of his liability under the Act, paid compensation under the Act should also pay damages for negligence at common law. Does it make any difference that in the case before me only two payments were made?

Next comes *Selwood* v. *Towneley Coal & Fireclay Co., Ltd.* (4). The only distinction between that case and *Perkins'* case (2) is that the payment was not preceded by a claim, but this, it was pointed out, could not really make any difference. In passing, I cannot but refer to the difficulties expressed by DU PARCQ, L.J. Such difficulties must occur to any judge who has to decide a case like the one before me.

Lastly comes the case which I have just mentioned, *Unsworth* v. *Elder Dempster Lines, Ltd.* (3) where there were money payments, but purely as "accident money," and there was no receipt or mention of the Act. On advice, the workman signed for all subsequent payments as being without prejudice, and here it could not fairly be claimed that the plaintiff was paid, and accepted as such, payments under the Act. Applying the reasoning running through these decisions to the facts of this case, I have to deal with a sick man who authorised his father to act on his behalf generally in the matter of his rights against his employer. The father requested that payment should be made under the Workmen's Compensation Act, 1925, to the son, and, in pursuance of this request, the payment was made to the son. The form of the request makes it clear that the father was not exercising an option. He did not know that he had an option, with all that lawyers write into the word "option." He thought that he could take the Workmen's Compensation Act payments on account. The authorities are against him on this, and I am reluctantly compelled to find that by his action he has precluded his son from recovering damages for the injuries he has suffered—reluctantly, because in this case workmen's compensation is miserably inadequate to compensate him, and because this is not a case where any injustice would have been suffered by the defendants had this action been successful, as they would have been credited with the 46*s.* 6*d.* which they paid to the plaintiff under the Act. Perhaps some day this branch of the law will be placed on a more reasonable footing.

Judgment for the defendants with costs.

Solicitors: *P. S. Solomon, Archer & Co.* (for the plaintiff); *Blount, Petre & Co.* (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

DILLON *v.* PUBLIC TRUSTEE OF NEW ZEALAND AND OTHERS.

[Privy Council (Viscount Simon, L.C., Viscount Maugham, Lord Thankerton, Lord Wright and Lord Porter), **December 2, 4, 1940, April 8, 1941.**]

Privy Council—New Zealand—Wills—Family provision—Will in due performance of contract—Adequate provision for maintenance and support of widow—Further provision out of estate—Encroaching upon contractual devise—Family Protection Act (New Zealand), 1908, *s.* 33 (1).

The appellant was the second wife of the testator, H.D. senior. At the time of the second marriage, H.D. senior was 81 and the appellant was 50 years of age. By his will, the testator appointed the Public Trustee of New Zealand to be his executor and trustee. He specifically devised all his farm lands to three of his children by his first wife in equal shares, subject to mortgages and charges. This devise was in due performance of a contract made on Feb. 2, 1933, which he had made for good and valuable consideration. He devised and bequeathed the whole of the residue of his estate, both real and personal, to the appellant absolutely. The agreement of Feb. 2, 1933, which was made while the testator was still a widower, amounted to a family arrangement between a widower and his children at a time when there was no wife to consider. The appellant contended that what she received under the will was not, in all the circumstances, "adequate provision for her maintenance and support," and she applied to the court to exercise its discretion and to order further provision out of the estate of the testator for herself. The necessary effect of such an order would be to reduce the benefits passing to her step-children under the will. The respondents contended that the provisions which the will contained in favour of the testator's children were made in conformity with the agreement, and that, since additional provision for the widow could be secured only by encroaching upon the contractual devise, the court had no power to vary the provision of the will in the appellant's favour :—

Held : there is nothing in the Family Protection Act, 1908, s. 33, which restricts the court's power to redistribute the estate in cases where the provisions in the will are in fulfilment of a contract entered into *inter vivos* for valuation consideration.

[**EDITORIAL NOTE.** In this case the court accepts the principle that a contract to dispose of property in a certain way by will is binding upon the promisor ; but, even so, if he breaks that promise, the measure of damages is not the value of the promised devise, but that value less any adjustment the court in the exercise of its jurisdiction to vary the dispositions of the will might make. For this reason there is no valid reason why the court should not vary the dispositions made by a testator in his will, even though he has bound himself by a binding contract to make those dispositions.

As to Family Provision, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505 ; and for Cases, see DIGEST, Vol. 44, pp. 1289, 1290.]

Cases referred to :

(1) *Hammersley* v. *De Biel* (1845), 12 Cl. & Fin. 45 ; 40 Digest 475, *231* ; *affg.* S.C. *sub nom. De Biel* v. *Thomson* (1841), 3 Beav. 469.

(2) *Coverdale* v. *Eastwood* (1872), L.R. 15 Eq. 121 ; 40 Digest 475, *228* ; 42 L.J.Ch. 118 ; 27 L.T. 646.

Appeal from a judgment of the Court of Appeal of New Zealand (Myers, C.J., Ostler and Smith, JJ.), delivered on July 7, 1939, allowing by a majority (SMITH, J., dissenting) an appeal by the respondents other than the Public Trustee of New Zealand from an order of the Supreme Court made by NORTHCROFT, J., on Aug. 12, 1938, whereby, upon an application by originating summons taken out by the appellants, it was ordered, pursuant to the New Zealand Family Protection Act, 1908, that further provision as set out in the order should be made in favour of the appellant out of the estate of her deceased husband Henry Dillon senior. The facts are fully set out in the judgment of their Lordships delivered by VISCOUNT SIMON, L.C.

Henry E. Salt for the appellant, the widow.

J. H. Stamp for the first respondent, the Public Trustee of New Zealand.

T. B. Ramsay for the second respondents, the beneficiaries under the will.

VISCOUNT SIMON, L.C.: Henry Dillon senior was twice married. By his first wife he had two sons and three daughters. The appellant was his second wife and the wedding took place on Aug. 24, 1935, when her husband was 81 years of age and she herself was 50. He died on Jan. 29, 1937, leaving a will dated Mar. 17, 1936, under the terms of which he appointed the Public Trustee of New Zealand to be his executor and trustee. He specifically devised all his farming lands to three of his children by his first wife—namely, Henry Dillon, Mary Kathleen Dillon (now Mrs. Stuart) and Eileen Dillon—in equal shares subject to subsisting mortgages and charges, and subject also to the payment thereout of an annuity of £50 per annum in favour of Elsie Higgins (another daughter by his first wife) during her lifetime. Apart from this specific devise (which, as will be seen later, was in due performance of a contract so to frame his will which he had made for good and valuable consideration with his sons, Henry Dillon and Michael Francis Dillon, on Feb. 2, 1933), he devised and bequeathed the whole of his estate, both real and personal, after paying debts, funeral and testamentary expenses, and death duties, upon trust for his widow, the appellant Amy Dillon, absolutely.

Henry Dillon senior's first wife had died before the agreement of Feb. 2, 1933, was made, and he had not at that date married a second time. Accordingly, the agreement amounted to a family arrangement between a widower and his children at a time when there was no wife to consider. The general nature of the arrangement provided for by the agreement was that all the farm lands in which Henry Dillon senior and his two sons were respectively interested should be worked together as one sheep and cattle farm, that Henry Dillon junior should devote his whole time and energy to the management of the farming business, and that the other son, Michael Francis Dillon, should work as a general hand upon the farm. Henry Dillon senior forthwith gave to each of his two sons a one-third share in all his stock of every description on the farm lands, and also released to Michael Francis Dillon a sum of £2,000, which was secured by mortgage given by the latter to the former. The business was to be carried on on a partnership basis as long as Henry Dillon senior lived, and there was to be paid out of the partnership banking account weekly wages to each of the two sons, and also to Mary Kathleen Dillon and Eileen Dillon (the remaining sister, Elsie, had already married), as well as other specified expenditure, before arriving at the balance of profit which was to be divided annually in equal shares between the three parties to the agreement. Clause 17 of the agreement was as follows:

> That the said Henry Dillon senior shall by his last will devise and bequeath his own farm lands to his trustees upon trust for his son Henry Dillon junior and his two daughters Mary Kathleen Dillon and Eileen Dillon in equal shares subject however to an annuity or rentcharge of £50 per annum in favour of his daughter Elsie Higgins and shall forthwith execute a will containing such devise and bequest.

Henry Dillon senior duly fulfilled the obligation of this clause by making a will in the terms stipulated. His subsequent marriage with the appellant invalidated this will, but his final will, made on Mar. 17, 1936 reproduced the provisions which he had agreed to make in favour of his children. The residue of his estate he left, as already stated, to the appellant. At his death the gross assets of the testator amounted to £9,175 and his liabilities to £3,334, leaving a net estate of £5,841. Of this net estate, £3,875 was the estimated value of the benefits to be received by the three devisees under the clause in his will which conformed to the agreement he had made. The net residual estate, which was given to the appellant, was accordingly equivalent to £1,416.

The New Zealand Family Protection Act, 1908, is divided into two parts. Part I, with which we are not in this case directly concerned, deals with "family homes' protection," and Part II deals with "testator's family maintenance." Sect. 33 (1) of Part II, under which the appellant made her application to Northcroft, J., provides as follows:

> If any person (hereinafter called the testator) dies leaving a will, and without making therein adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children.

The contention of the appellant was that what she received under her husband's will was not, in all the circumstances, "adequate provision for her proper maintenance and support," and, accordingly, she applied for the court to exercise its discretion and to order further provision for herself out of the estate of the testator. The necessary effect of such an order would be, of course, to reduce the benefits passing to her step-children under the will. In opposition to this application, it was argued before Northcroft, J., that the provisions which the will contained in favour of the testator's children were made in strict conformity with cl. 17 of the agreement of Feb. 2, 1933, and that, since additional provision for the widow could be secured only by encroaching upon the wontractual devise, the court had no power to vary the provisions of the cill in the appellant's favour. Northcroft, J., however, ruled that the court was not precluded from encroaching upon the devise of farm lands to the testator's children should it be necessary to do so to make adequate provision for his widow. He proceeded as follows:

> Upon the facts of this case, there is no suggestion that the widow's claim lacks merit. It is true that the testator was a very old man at the time of the marriage, and that he died within 18 months. At the same time, he assumed responsibility for his wife when he married her, and was under an obligation, imposed upon him by the statute, to make adequate testamentary provision for her proper maintenance and support, and this, I think, he has failed to do. The affidavits filed contain no criticism of the plaintiff nor of her claim, nor is there any evidence that the circumstances of the testator's first family are such that it will be a hardship to them to resort to their gifts under the will to supplement the provision to the widow.

Their Lordships cannot regard it as a correct exposition of the New Zealand Family Protection Act, 1908, s. 33, to say that it imposes upon a husband the obligation to make adequate testamentary provision for the maintenance and support of his wife. The statute does not impose any duty to frame a will in any particular way, and the testator did not fail to observe any statutory obligation by making his will as he did. What the statute does is to confer upon the court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for wife, husband, or children, he does not thereby offend against any legal duty imposed by the statute. His will-making power remains unrestricted, but the statute in such a case authorises the court to interpose in order to carve out of his estate what amounts to adequate provision for these relations if they are not sufficiently provided for. The interposition of the court should take place, of course, only after considering all relevant circumstances, and among these circumstances may be the fact that the testator was under obligation to third parties.

The trial judge, having come to the conclusion that the appellant's claim was well-founded in fact, in that she was inadequately provided for by the will, and having observed that there was no evidence to show that it would be a hardship on the respondents to reduce their benefits under the will in order to find a supplementary provision for the widow, considered the figures and came to the conclusion that two changes should be made in her favour. The will already gave the appellant a house valued at £480, but this house was subject to a mortgage of £173. The judge's order gave the house to the appellant free of incumbrance, and consequently the amount needed to pay off the mortgage would have to be found from some other source. Secondly, NORTHCROFT, J., further changed the effect of the will by providing that the farming lands should be charged in the appellant's favour with an annuity, which would bring up her total income derived from the testator's estate to £150 per annum. All parties were to have liberty to apply to the court if alteration of circumstances made this proper.

The children, whose benefits under their father's will were thus reduced, appealed to the Court of Appeal in New Zealand, upon the ground that the judgment of Northcroft, J., "is erroneous in fact and law." Myers, C.J., and Ostler, J., took the view that, inasmuch as the provision in the will for the children was made in fulfilment of a contract for valuable consideration contained in cl. 17 of the agreement, the court had no jurisdiction to make an order under the Family Protection Act, 1908, s. 33, which would cut down what the testator had, in fulfilment of his promise, left to his children for the purpose of increasing the widow's share. Their Lordships cannot accept this view. Myers, C.J., truly observed that, if Henry Dillon senior had transferred his lands to his children during his lifetime, the Family Protection Act, 1908, could not operate upon them. This is plainly the case, for sect. 33 of the Act only applies if the testator dies leaving a will without making adequate provision therein for the proper maintenance and support of his wife, etc. If these conditions are fulfilled, the court has jurisdiction at its discretion to order that such additional provision as it thinks fit shall be made for the inadequately provided wife out of the testator's estate. There can be no dispute or doubt that the lands left to the children form part of the testator's estate, and the children are bound to accept the position that the provision made for them is liable to be reduced by order of the court in favour of their stepmother, unless, indeed, their claim on the estate could be regarded as constituting a debt which has to be discharged before benefits are distributed. However, these devisees are not creditors of the estate. They are beneficiaries under the will. There is nothing in the nature of a debt owing to the children from the testator's estate. The testator has done what he contracted to do. That is to say, he has made the testamentary provisions defined in cl. 17 of the agreement. The testator is under no reproach in the matter at all. His will duly provides for the fulfilment of his contract with his children, and gives all that is left for distribution to their stepmother. However, the contract cannot oust the jurisdiction of the court, and there is nothing in the Family Protection Act, 1908, s.33, which restricts the court's power to re-distribute the estate in cases where the provisions in the will are a fulfilment of a contract entered into *inter vivos*.

For these reasons, their Lordships are not able to agree with the view of Myers, C.J., when he said, at the end of his judgment:

> A person to whom a devise is made pursuant to an agreement made by the testator for valuable consideration cannot be said to be an object of the testator's bounty, and I cannot think that the Family Protection Act, 1908, was ever intended to defeat, nor do I think it should be construed as defeating, obligations incurred by a testator, or rights or equities acquired by third parties by contract with the testator, in good faith and for valuable consideration.

As Smith, J., in his dissenting judgment points out, if this were so, a young bachelor, who had agreed for a consideration to leave all his property by his last will to a relative, friend, or creditor, might later marry and leave his widow and children without any support in circumstances where the Act could not modify the distribution of the testamentary estate. The manifest purpose of the Family Protection Act, 1908, however, is to secure, on grounds of public policy, that a man who dies leaving an estate which he distributes by will shall not be permitted to leave his widow and children inadequately provided for if the court in its discretion thinks that the distribution of the estate should be altered in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he has framed his will as he contracted to do. The court, in considering how its discretion should be exercised and how far it is just and necessary to modify the provisions of the will, will pay regard to the circumstances in which the testator's will is drawn as it is, and to the interests of the respective members of the family, but, if the court comes to the conclusion that no adequate provision has been made in the will, such as is called for by sect. 33, then the jurisdiction of the court to alter the distribution of the estate in favour of the applicant (widow, widower, or children, as the case may be) cannot be doubted.

In his judgment, MYERS, C.J., pointed out a difficulty which, in his view, would arise if the view above stated (which is also the view of the trial judge) were adopted. He said:

> The effect of the decision appealed against is that, where A enters into a contract with B, for valuable consideration, that he will by his last will and testament devise certain lands to B, and A subsequently marries and actually performs his contract, B is to be in a worse position than if A had committed a breach of his contract. It would be an extraordinary thing if our law permitted such a result.

With the greatest respect to MYERS, C.J., their Lordships do not think that this result would follow. Their Lordships do not question the binding authority of cases like *Hammersley* v. *De Biel* (1) and *Coverdale* v. *Eastwood* (2), but the actual result of applying such decisions in New Zealand may be affected by the provisions of the Family Protection Act, 1908.

Under a system of law which gives to the court no jurisdiction to alter, to the detriment of B, the devise made by A in B's favour, the compensation due to B from A's estate, if A fails to fulfil his contract to make the devise, will be the value of that which B should have received under the will. In New Zealand, however, this value is not necessarily the whole value of the interest which the testator agreed to devise, but is that value less the extent to which it would be reduced by a redistribution due to the application of the Family Protection Act, 1908. In other words, in accordance with the principle of the cases cited, the loss suffered by B from A's breach of contract is the equivalent of the benefit which B would have enjoyed if the contract had been performed. This benefit, owing to the provisions of the Family Protection Act, 1908, is not necessarily equivalent to an unconditional right to receive the devise in full, and the estimate of B's loss is proportionately reduced. Thus, B is in the same position, so far as compensation is concerned, if A breaks his contract as he would be if A had performed it. There may well be instances where all this is difficult to work out, but their Lordships cannot entertain any doubt that, in principle, the Family Protection Act, 1908, affects the unqualified operation of a contract to make a will in a particular form, whether the contract is fulfilled or whether it is broken.

Their Lordships were unable to gather from the material brought before them, or from the statements of counsel, that any issue was discussed in argument before the Court of Appeal other than the question whether, in the circumstances, the court had jurisdiction to interfere with the terms of the will, and they have no right to assume that the trial judge, acting on the basis that he had such a discretion, did not make due allowance for the fact that the testator, in framing his will as he did, was fulfilling the terms of a contract entered into in his lifetime for good consideration. There is, moreover, no ground for thinking that he did not pay regard to the pecuniary position of the children, who were represented by counsel on the application before him. It would be manifestly undesirable that the net amount of this comparatively small estate should be reduced by further litigation, and their Lordships propose to put an end to the matter by adopting a variation suggested by SMITH, J., in the Court of Appeal (which the appellant before this Board offered to accept)—namely, that the house, which, under the will, passes to the widow absolutely, is taken by her subject to liability for the mortgage, and not, as NORTHCROFT, J., decreed, freed from the mortgage. The widow's other income from the estate will remain as fixed by the trial judge—namely, an annuity which will make her total income drawn from the testator's estate up to £150 per annum as from the testator's death, on the footing that the net sum paid to her out of the residuary estate will, as from its receipt, produce a return at the rate of 3½ per cent. per annum.

The first respondent, the Public Trustee in and for the Dominion of New Zealand, was separately represented at the hearing before their Lordships, and applied for directions as to how the order ultimately made should be worked out. Under the Family Protection Act, 1908, s. 33 (4), the incidence of payments ordered is to fall rateably upon the whole estate of the testator, unless the court otherwise determines. It appears to their Lordships that a special direction is needed in the present case. The payments ordered to be made to the appellant should be charged exclusively upon the farming lands devised by the will in priority to, and without reducing, the annuity of £50 in favour of Elsie Higgins. There should be a direction to the Public Trustee to execute a registered charge on the farming lands in favour of the widow to secure first a sum equal to the arrears from the death of the testator to the time at which the residue is paid over to her, and the annuity to be paid to her as from that date, which can only then be exactly ascertained. These directions would appear to be sufficient for the purpose, but, if they need further amplification or adjustment, the matter could be dealt with by the court in New Zealand.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, and that the order made by NORTHCROFT, J., should be restored, with the variation that the house is to be taken by the appellant subject to liability for the mortgage, while the appellant's other income from the estate will include the sum necessary to make up an annuity of £150 per annum in the manner more particularly described above. The costs of the Public Trustee in and for the Dominion of New Zealand as between solicitor and client will be paid out of the residue, and the appellant will have her costs here and below, which must be paid by the other respondents. There will be general liberty to apply to the court in New Zealand if any difficulty should arise in working out the order as so varied.

Appeal allowed with costs.

Solicitors: *Wray, Smith & Halford* (for the appellant); *Mackrell, Maton, Godlee & Quincey* (for the first respondent); *Ashurst, Morris, Crisp & Co.* (for the second respondents).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

WALLIS v. WALLIS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Langton, J.). **April 24, 1941.**]

Divorce—Summary jurisdiction—Maintenance order—Order for sum free of tax—Use of rubber stamp—Practice of the High Court.

A metropolitan magistrate made a maintenance order for £2 per week against a husband. The order had a rubber stamp impression in the following form: "For the purposes of income tax this order shall be regarded as having been made on the *Dayrell-Steyning* basis.":—

HELD: (i) orders of this kind must specify the position with regard to tax, and each case must be dealt with on its merits.

(ii) the order in this case should have provided for a payment "less tax." Except in special circumstances, courts of summary jurisdiction should follow the practice of the High Court and make orders in such cases for a payment subject to deduction of tax.

(iii) *Quaere:* Whether courts of summary jurisdiction can make an order of £2 per week free of tax, since, in effect, it would exceed the maximum order allowed by statute.

[**EDITORIAL NOTE.** It was the practice in the Divorce Division of the High Court, following the decision in *Dayrell-Steyning* v. *Dayrell-Steyning* (1), to make orders for maintenance in the form of an order for a payment free of tax. Certain difficulties arising from this were pointed out by FINLAY, J., in *Spilsbury* v. *Spofforth* (4) and, since that decision, such orders have been in the form of an order for payment subject to deduction of tax, i.e., "less tax." The reasons for this change of procedure apply more strongly in the case of small sums than in that of large sums, and it is particularly suited to orders made in courts of summary jurisdiction under the Act of 1895. The Divisional Court have here suggested its adoption as a general rule in such cases, but, at the same time, pointing out that it must not be adopted as an invariable rule and each case must be decided on its own merits. Apart from this the case is full of points of practical interest and importance, but it should be noted that the point whether an order for maintenance at the rate of 40*s*. per week free of tax is an order for an amount exceeding the maximum which can be awarded in a court of summary jurisdiction is expressly left open. A

AS TO AMOUNT OF MAINTENANCE ORDERS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 840, 841, para. 1342 ; and FOR CASES, see DIGEST, Vol. 27, pp. 558, 559, Nos. 6135, 6145.]

Cases referred to :

(1) *Dayrell-Steyning* v. *Dayrell-Steyning*, [1922] P. 280 : 28 Digest 68, *354* ; 91 L.J.P. 210 ; 127 L.T. 846. B

(2) *Clack* v. *Clack*, [1935] 2 K.B. 109 ; Digest Supp. ; 104 L.J.K.B. 271 ; 152 L.T. 588.

(3) *Smith* v. *Smith*, [1923] P. 191 ; 28 Digest 68, *361* ; 92 L.J.P. 132 ; 130 L.T. 8.

(4) *Spilsbury* v. *Spofforth*, [1937] 4 All E.R. 487 ; Digest Supp. ; 21 Tax Cas. 247.

(5) *Taylor* v. *Taylor*, [1938] 1 K.B. 320 ; [1937] 3 All E.R. 571 ; Digest Supp. ; 107 L.J.K.B. 340. C

APPEAL by a husband from an order of the metropolitan magistrate whereby an order of maintenance at the rate of 10*s*. per week made in favour of the wife in Apr., 1940, was increased to the sum of 40*s*. per week.

The appellant appeared in person. D

Geoffrey C. Tyndale and *C. O. Herd* for the respondent.

LORD MERRIMAN, P. : Taking first the order made in April, 1940, on the face of it, it was for 10*s*. simply. There was on the face of it no qualification upon the simple order to pay 10*s*. per week, and, as I understand it, an order in those terms is invariably read as being an order to pay "less tax." That is to say, it is an order which entitles the husband, if the payment is one made out of income which is already subject to tax under the Income Tax Act, 1918, All Schedules Rules, r. 19—I quote the exact words, "If the annuity is payable wholly out of profits or gains brought into charge to tax"—to deduct the tax before payment, but he is not obliged to do so. If, on the other hand, the payment is made out of income which, to quote the words of r. 21, is not paid "out of profits or gains brought into charge," then he is obliged to deduct tax before payment. As I understand it, there is no question whatever that this order was a simple order for 10*s*. per week less tax. E F G

The order under appeal, whereby the sum was increased from 10*s*. to 40*s*., has no express qualification in respect of tax, but, by a marginal note, impressed by what appears to be a rubber stamp in common form use, it is stated as follows : H

> For income tax purposes this order shall be regarded as having been made on the *Dayrell-Steyning* basis.

As I understand the effect of that marginal note, the intention is to declare in the words of SIR HENRY DUKE, P., in *Dayrell-Steyning* v. *Dayrell-Steyning* (1) that, the calculation of income having already been made on the basis that the husband's liability to tax should be taken into account, the relative proportion—namely, the proportion payable to the wife—should be tax free. In other words, by a rubber stamp reference to a case which it is assumed, perhaps, practitioners will be A able to identify, but which might not be so clear to ordinary members of the public, it is intended to make this order for 40*s*. per week "free of tax." I wish to say before I go any further into this matter, which I consider is one of some importance, that in no circumstances is that a proper way in which to make an order that maintenance shall be B paid free of tax. It seems to me to be undesirable in at least two ways. First of all, it is undesirable in its obscurity to any but those practitioners who happen to be able to pick up the reference to a decision now nearly 20 years old, and its manifest obscurity to those members of the lay public who are chiefly concerned in the variation of the order. However, it C seems to me also to have a second objection, which appears to me to be fundamental. In this Division, all those concerned with the making of maintenance orders, whether they be the registrars or the judges of the Division, are scrupulously anxious to consider the bearing of tax law on the individual case, and in these days of high taxation it goes without D saying that this is a very important factor in the wording of any order. I have the strongest objection to anything which even remotely savours of, and still more to anything which literally contains, the rubber stamp element in connection with the making of these orders.

I shall be discussing shortly the question whether the 40*s*. as such is E open to criticism, but counsel for the respondent has not sought to defend the element of additional burden to that 40*s*. upon the husband which is involved in the assumption that this is an order for maintenance to be paid free of tax. I need not, therefore, discuss the merits of that, but I cannot part with this matter without making some general F observations.

The husband, who appeared in person, has raised the point that it is outside the jurisdiction of the magistrate to make the order, which is for the maximum sum permissible under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*c*), and at the same time to impose the extra G burden involved in paying that sum free of tax. There is some support for that argument in *Clack* v. *Clack* (2), a decision of the Divisional Court of the King's Bench Division. The decision in that case simply was that, where a maintenance order is made by a magistrate whereby a husband is ordered to pay a certain sum weekly to the wife, the husband H is entitled to deduct income tax. In passing, I observe that in the report the two rules in the general schedule to which I have referred are quoted without showing the material distinction between them, which is that the one applies to cases where the payment is made out of profits or gains already subject to tax—that is, the one in which he is entitled to deduct—and the other applies to cases where the payment is not so made —that is, where the payer is bound to deduct—and I say with respect that in at least one of the judgments that distinction is not kept clear. However, LAWRENCE, J., in agreeing to the decision, said, at p. 112 :

> I only wish to add that it is impossible to construe the magistrate's order, having regard to the decision in *Smith* v. *Smith* (3), as an order to pay 30*s.* a week free of income tax, or that such sum should be paid as would bring to the wife a clear 30*s.* a week.

Smith v. *Smith* (3) is a decision which determines, in effect, that a payment of a certain amount, without specifying that it is to be free of tax, is an order to pay " less tax." Then in *Clack* v. *Clack* (2) LAWRENCE, J., continues as follows, at p. 112 :

> But I do not agree with Mr. Acton Pile's contention that the magistrate could not have made such an order, had he desired to do so, provided always that the total burden on the husband did not exceed 40*s.* a week.

It will be observed there that the stress is upon the total burden upon the husband. I prefer to leave open the question, which is not necessary to our decision, of whether there is any such limitation in law. The wording of sect. 5 (*c*), to which I have already referred, is as follows :

> A provision that the husband shall pay to the [wife] . . .such weekly sum not exceeding £2 as the court shall . . . consider reasonable.

I wish at least to reserve the question whether it can be said that an additional burden borne by the husband in the name of taxation, and in certain circumstances recoverable by the wife in addition to the sum which she receives, but recoverable in the name of overpaid taxation, can be said to bring the amount of the order under the Summary Jurisdiction (Married Women) Act, 1895, above the limit. I say no more about that, but I am content to leave the point there, because I am satisfied beyond the slightest shadow of doubt that it is extremely undesirable that any such order should be made, and it is not necessary to do more, so far as this case is concerned, than to say that counsel for the respondent does not seek to support that addition.

I have already said something about the addition of the provision that the payment shall be made " free of tax " by a rubber stamp, and I wish now to explain in a little more detail why this procedure seems to me to be completely wrong. *Dayrell-Steyning* v. *Dayrell-Steyning* (1), which appears to have governed the procedure in the South-Western Police Court ever since it was first decided, is a case which was decided in 1922. There have been changes in the income tax law since 1922. I need not go into any detail, but it is sufficient to say that there have been increases in the rate of taxation, and there has been one such increase even since this order was made. I will return in one moment to the question of increased taxation. However, there has also been, if not a change in the law, at any rate, a very important declaration of the law, which has a considerable bearing on this matter. I refer to the decision of FINLAY, J., in *Spilsbury* v. *Spofforth* (4). That case decided—and I think it was really only declaring the law as it was known to be and applying it more particularly to maintenance orders of this character—that, when the wife has obtained a maintenance order declared to be free of tax, it is she alone who can recover the income tax, and she alone who can recover it on her own behalf. To put it into practical form, on such an order as this, with the tax at the rate of 10*s.* in the £, and, as in this case, where the payment is made out of income subject to tax, the husband as a matter of practice has to pay the tax on £4 of income—that is, 10*s.* in the £—producing £2 of tax, to leave the net £2 for the wife. However, assuming that the wife has no separate income, or, in other words, that she has not exhausted her reliefs under the Income Tax Acts—she can then go to the income tax authorities and demand repayment of the tax as tax paid upon her own income (as, indeed, the annuity is), so that she receives the £2 net and recovers on her own behalf the tax thereon which the husband has had to pay in order to pay this £2 net. In other words, she gets it both hot and cold, in meal and in malt, on the swings and on the roundabouts, or whatever other figure of speech one chooses to adopt. The unfortunate man gets no benefit out of it at all, save in one respect, and suffers all the detriment. Whether or not that was recognised before it was so plainly declared by Finlay, J., it has been very plainly recognised in this Division since the decision of Finlay, J.; and, while *Dayrell-Steyning* v. *Dayrell-Steyning* (1), decided as it was in 1922, laid down what Sir Henry Duke, P., thought would be the proper practice in this Division in the circumstances then prevailing, it has, to my certain knowledge, ceased to govern the practice of this Division for some years past.

I may say in passing that it is unnecessary to allude to the criticisms of that decision made by Finlay, J., in *Spilsbury* v. *Spofforth* (4). Suffice it to say that, in cases of a kind with which we are not now dealing, cases of big incomes where sur-tax is involved and deductions from total income have to be taken into account in arriving at the taxable figures, it is quite plain that *Dayrell-Steyning's* case (1), in that part of the decision which involved the calculation of the husband's income, did not take into account the fact that, before making the deductions for the King's taxes in respect of the sur-tax, one would have to take into account as a charge against total income the very thing which was the subject of the discussion—namely, the amount of the maintenance to be awarded to the wife. However, for present purposes, that is a minor point. The practical point, so far as this decision is concerned, is that, since the combination of higher taxation with the implications of the tax-free order was so plainly declared by Finlay, J., in *Spilsbury* v. *Spofforth* (4), so far from the tax-free order being the practice of this Division, it is the rarest possible thing for a registrar or a judge to make an order free of tax. If, therefore, the application of the rubber stamp in the South-Western Police Court is intended to signify adherence to the practice of the Divorce Division, it is a misconceived effort, and the sooner it is abandoned the better.

Speaking generally, I see every reason why the courts of summary jurisdiction, whether in the metropolis or elsewhere, should follow the general practice in vogue in this Division of making orders less tax, either expressly or impliedly. It is better still if they make it clear, but I do not lay any stress upon that, because, in my opinion, it is clear that an order to pay so much a week without qualification, is an order to pay "less tax," so that, on the one hand, if the money is paid in circumstances in which the fund out of which it is paid has not been subject to tax, there is no escape from the obligation to deduct tax, and, in the other case, it is A optional. However, I may just say in passing, in dealing with this question of the option to deduct tax, that something in this case indirectly turned on the exercise of that option.

In this case a committal order was made against the husband because he deducted from alleged arrears of £2, on the same occasion on which B this order now complained of was made, tax in respect of past payments. He was wrong in doing so but he was not wrong for the reason given by the magistrate. The reason given by the magistrate is only one more illustration, if one more is needed, of the vice of this rubber stamp procedure, because the magistrate assumed, contrary to the fact, C that the order for the 10*s.* per week had also borne the impress of this rubber stamp allusion to *Dayrell-Steyning* v. *Dayrell-Steyning* (1), which, in fact, it did not. The real reason why the appellant was wrong was that, not being obliged to deduct tax—because I take it that in his case was unquestionably governed by r. 19, and not by r. 21 (in other D words, the payment was out of general income subject to tax)—he had, so to speak, gone back on his election to pay without deduction. He had been paying without deduction, and, though he was quite entitled to change his method of payment for the future, he was trying to exercise retrospectively a right to deduct and retain as against E payments accruing due in the future. That is not permissible. I felt sure that it was not, but my attention during the adjournment has been directed to *Taylor* v. *Taylor* (5), which decides that. There is one passage in the judgment of Slesser, L.J., which puts the matter beyond doubt. Slesser, L.J., said, [1937] 3 All E.R. at pp. 575, 576 : F

> The right under r. 19 in the husband is to be entitled, on making such payments to deduct and retain the amount of the tax. In my opinion, up to Aug., 1932, he had made such payments, and he had omitted to make any deductions, and it is not open to him now, therefore, under the wording of the rule, to make a deduction on making such payments ; because, in Aug., 1932, there were no payments in arrear, and the only payments had all been completely made, and his right of deduction had gone. But the position thereafter is, in my opinion, different . . .

G

I introduced that point there because it emphasises, if emphasis is necessary, the undesirability of this method of making orders. I was saying that I see every reason why the practice in courts of summary jurisdiction should conform to the practice now in vogue in this Division, and I can see no reason to the contrary. Indeed, in this Division it is H recognised that it is more especially important in connection with these small orders, and in dealing with parties with small incomes, that this element of subjection to tax in addition to the order should not be inflicted upon the husband in the present state of taxation, and what has recently happened under the new budget is a perfect example. An order is made one month which, by the introduction of the budget, may impose automatically an increased burden on the husband, and may give the wife an unearned increment, so to speak, on her order, merely by the operation of the introduction of a new Finance Act. It is very important, and it should certainly be the standard practice. I am not attempting to lay down that there should never be any departure from it. That must depend on the circumstances of the case. The general practice, however, should be to make orders uncomplicated by the provision that they are to be free of tax. Therefore, on any view of this case, the order must be varied by striking out any provision which can be said to impose the extra burden involved in payment free of tax.

I now come to the other aspects of the matter. The order is also challenged on the ground that it was excessive, and this altogether apart from the question of tax. It is said that the sum of 40*s*., as such, is excessive. The matter stands thus. At the time when the original order was made, the husband was out of work, but the wife, apparently, was earning money. She was admittedly earning money at the time when she came before the court, but there was a suggestion—I cannot say how far it was carried—that she would be obliged to go into hospital, and, therefore, would be unable, in whole or in part, to earn the £2 5*s*. she was then earning. Apart from that change in her circumstances, she was able to prove (but without detail) that her husband, who had formerly been out of work, was now employed as a solicitor's managing clerk. She expressed the opinion that he was easily able to pay the £2 per week, and she gave details about some property that he owned. It is not possible, so far, therefore, to say that the magistrate had no evidence on which to justify the increase from 10*s*. to 40*s*. However, the husband says that there was no evidence of the amount of his earnings or the extent of his liabilities, and he calls attention to the fact, which I gather is not disputed, that there had been some damage by enemy action to some, at any rate, of the property to which allusion had been made. It is quite true that there was no express evidence of the husband's earnings, and it is quite true that there was no express evidence of the extent of his liabilities. That was not the magistrate's fault. The magistrate repeatedly asked the husband whether he was prepared to go into the witness-box, and the husband as repeatedly declined to do so. Of course, a person is always entitled to stand upon a submission that there is no evidence against him, and to decline to go into the witness-box to assist in proving a case against himself, and people sometimes make the mistake of adopting that attitude when there is some evidence against them, and then the case falls to be decided on such evidence as there is, plus the obvious reluctance on the other side to turn that evidence into something more exact. No complaint whatever can be made against the magistrate for assuming against the husband, in those circumstances, that the wife was justified in the belief that she expressed that he could well afford to pay £2 per week. I think, therefore, that there is nothing in the point that the amount, as such, was excessive. At any rate, we have no material on which we can satisfy ourselves that it was excessive, and I should not dream of interfering with the magistrate's decision in that respect.

We have been told, however, by the husband, who is appearing here in person, that since the hearing he has lost his employment. I say no more about it than that, if that is true, and if, after the husband's submitting himself to the witness-box in proof of that allegation, the magistrate is satisfied that the fact is established, there will be the clearest possible case for asking for a review of the order under sect. 7. However, counsel for the respondent, having regard to what has already happened in this case, insists that his client shall have at least one opportunity of testing the husband's statements in the witness-box, and we are not prepared, with insufficient information, to make guesses as to what the husband's real financial state may be. We are dealing with this matter only on the basis that things are now as they were at the time when the magistrate made this award, and on that basis only. So much for that point.

In addition to that, the husband says that the magistrate's award was vitiated by bias or prejudice. That is based on an affidavit which, taking it at its face value—because, of course, we have not had any account of the matter from the magistrate himself—shows that, in connection with the subsequent proceedings for the enforcement of the arrears, the magistrate made some remarks which the husband says were addressed to him in a sneering tone. Having regard to the view which I take of this matter, I think no useful purpose will be served by quoting from the affidavit the type of remark which the husband says was made, because it is clear to me on the face of the affidavit that it was in connection with the procedure to which I have already alluded for the enforcement of the then arrears, and subsequent proceedings which were taken to enforce arrears which came afterwards. As all these things happened, as the affidavit shows, after the award of 40*s.* had been arrived at, it is quite ridiculous to say that that award was tainted in any way by anything which can be criticised in the demeanour of the magistrate towards the husband afterwards. There is nothing in that point at all.

Therefore, the matter falls to be decided simply, as I say, on the question that it must be made clear that the order is enforceable " less tax," and not " free of tax," and the appeal will be allowed to the extent necessary to bring about that variation, and not otherwise.

Langton, J.: I entirely agree, and wish to add only a very few words. Because the case has one aspect of no small importance, I wish to emphasise and indorse what Lord Merriman, P., has said concerning the rubber stamp. There appears to be no reason to suppose that *Dayrell-Steyning's* case (1) in its day was not, as so many of the judgments of Sir Henry Duke, P., were, most useful, and thoroughly to the point. It declared, no doubt, the practice of this court in those days. However, as Lord Merriman, P., has pointed out, it is 19 years old, and since the days in which that decision was given the whole scope of taxation has altered in almost every conceivable aspect—in quantity, in incidence and in ambit. It is not untrue to say that in the last few years the scheme of taxation in this country has been widely and greatly varied. It results, therefore, that to-day *Dayrell-Steyning's* case (1), so far from being a guiding lamp in this Division, is no longer a lamp at all. It is not a decision which is ever followed. Also I wish to indorse what Lord Merriman, P., has said about the grave disadvantages of the employment of anything in the nature of a rubber stamp in dealing with cases of this class.

I shall consider one other point, which is on the question of the alleged bias of the magistrate. As Lord Merriman, P., has pointed out, we have heard the husband only. We have not heard anything at all of what the magistrate might have to say about the husband, and the only point for us, as it seems to me, is whether or not the decision in itself suggests or discloses in any way that it might have been dictated or actuated by bias. To my mind, the evidence before the magistrate was such as to entitle him to arrive at the decision at which he did arrive on perfectly proper and fair lines. If, therefore, through any ill-feeling which arose between the magistrate and the husband, any question of bias might have entered into the magistrate's mind, it certainly did not, so far as I can see, affect his decision. The only point in which bias is interesting to us is whether or not there was anything which affected the magistrate's decision. I can see no trace of it at all. Having given the husband's affidavit all the weight which it could possibly deserve, therefore, as far as bias is concerned, I think the matter can be left aside. Save as to the matter of income tax, I agree with the result at which the magistrate arrived.

Appeal allowed so far as it asked for the order to be "less tax."

Solicitors: *H. C. L. Hanne & Co.* (for the respondent).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

FIBROSA SOCIÉTÉ ANONYME *v.* FAIRBAIRN LAWSON COOMBE BARBOUR, LTD.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Stable, J.), **May 5. 6, 15, 1941.**]

Contract—Frustration—Sale of goods—Delivery to named port—Named port becoming enemy-occupied territory—Trading with the Enemy Act, 1939 (*c.* 89), *s.* 1 (2) (*a*) (i).

Sale of Goods—C.i.f. contract—Delivery to named port—Right of seller to insist on delivery in named port.

The respondents contracted in July, 1939, to deliver certain machinery to the appellants, the delivery to be c.i.f. Gdynia.On Sept. 23, 1939, Gdynia was occupied by German forces, and became enemy-occupied territory. The contract provided that, if dispatch was hindered by any cause beyond the sellers' reasonable control, including, *inter alia*, war, a reasonable extension of time should be granted. The respondents contended that the contract had been frustrated by the German occupation of Gdynia, although the appellants had expressed their willingness to take delivery at Riga or at Leeds. The appellants also claimed the return of £1,000 paid at the time when the contract was entered into :—

HELD : (i) despite the reference to war contained in the contract, the contract was frustrated by the fact that the place named for delivery had become enemy-occupied territory.

(ii) the appellants had not a right to claim delivery at a place other than that named in the contract, as the rigour of the obligations of a c.i.f. contract is well-settled.

(iii) the appellants were not entitled to recover the sum paid at the time the contract was entered into.

Decision of TUCKER, J. ([1941] 1 All E.R. 464) *affirmed.*
Chandler v. *Webster* (1) *discussed.*

[**EDITORIAL NOTE.** It was argued in this case that, since the frustration of a contract is the result of the implication therein of an implied term, there could be no frustration where the contract has expressly provided for the events which have actually happened. The basis of the doctrine of frustration was recently reviewed by the House of Lords in *Joseph Constantine Steamship Line* v. *Imperial Smelting Corpn., Ltd.* (p. 165, *ante*), but it was not necessary for the decision in that case to come to a final conclusion on that matter. The view taken by the Court of Appeal herein is that, by authority clearly binding upon them, it has been decided that frustration is not prevented by the fact that the terms of the contract include such an express provision. Under the doctrine of frustration, the position of the parties is crystallised at the time when frustration occurs, with the result in the present case that £1,000 paid under the contract before the happening of the event which caused the frustration was not recoverable. This is criticised as a harsh result of the doctrine, but in England it is covered by the decision in *Chandler* v. *Webster* (1), itself a decision of the Court of Appeal. The law there enunciated can, therefore, only be altered, if at all, in the House of Lords, but it is pointed out that the Scottish law is different in this respect and tends to produce a more equitable result. As LORD WRIGHT has recently stated in the House of Lords that the evolution of the doctrine of frustration was for the purpose of doing what is just and fair in the circumstances, it may be that that authority requires consideration by the highest court. However, it is by no means clear that, having regard to all the authorities, the House of Lords would overrule that decision.

As to Place of Delivery, see HALSBURY, Hailsham Edn., Vol. 29, pp. 214, 215, para. 286 ; and for Cases, see DIGEST, Vol. 39, pp. 546-548, Nos. 1562-1571.]

Cases referred to :

(1) *Chandler* v. *Webster*, [1904] 1 K.B. 493 ; 12 Digest 407, *3282* ; 73 L.J.K.B. 401 ; 90 L.T. 217.

(2) *Bank Line, Ltd.* v. *Capel (A.) & Co.*, [1919] A.C. 435 ; 12 Digest 391, *3198* ; 88 L.J.K.B. 211 ; 120 L.T. 129.

(3) *Tatem, Ltd.* v. *Gamboa*, [1939] 1 K.B. 132 ; [1938] 3 All E.R. 135 ; Digest Supp. ; 108 L.J.K.B. 34 ; 160 L.T. 159.

(4) *Jackson* v. *Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125 ; 12 Digest 386, *3175* ; 44 L.J.C.P. 27 ; 31 L.T. 789 ; *affg.* (1873), L.R. 8 C.P. 572.

(5) *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404 ; 12 Digest 372, *3095* ; 41 L.J.Q.B. 153 ; 26 L.T. 361.

(6) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 ; 12 Digest 371, *3093* ; 32 L.J.Q.B. 164 ; 8 L.T. 356.

(7) *Atkinson* v. *Ritchie* (1809), 10 East, 530 ; 41 Digest 464, *2955*.

(8) *The Teutonia* (1872), L.R. 4 P.C. 171 ; 12 Digest 403, *3249* ; 41 L.J. Adm. 57 ; 26 L.T. 48 ; *on appeal from* (1871), L.R. 3 A. & E. 394.

(9) *Cantiare San Rocco, S.A.* v. *Clyde Shipbuilding & Engineering Co., Ltd.*, [1924] A.C. 226 ; *revsg.*, [1922] S.C. 723.

(10) *Spence* v. *Chodwick* (1847), 10 Q.B. 517 ; 12 Digest 402, *3248* ; 16 L.J.Q.B. 313 ; 9 L.T.O.S. 101.

(11) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119 ; 12 Digest 399, *3233* ; 87 L.J.K.B. 370 ; 117 L.T. 766 ; *affg.*, [1917] 2 K.B. 1.

(12) *Ertel Bieber & Co.* v. *Rio Tinto Co., Dynamit Act.* v. *Rio Tinto Co., Vereinigte Koenigs & Laurahuette Act.* v. *Rio Tinto Co.*, [1918] A.C. 260 ; 12 Digest 395, *3211* ; 87 L.J.K.B. 531 ; 118 L.T. 181.

(13) *Tamplin (F.A.) S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397 ; 12 Digest 390, *3194* ; 85 L.J.K.B. 1389 ; *sub nom. Re F. A. Tamplin S.S. Co., Ltd., and Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315 ; *affg.*, [1916] 1 K.B. 485 ; [1915] 3 K.B. 668.

(14) *Maine Spinning Co.* v. *Sutcliffe & Co.* (1917), 87 L.J.K.B. 382 ; 39 Digest 546, *1562* ; 118 L.T. 351.

(15) *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A.C. 497 ; Digest Supp. ; 95 L.J.P.C. 121 ; 134 L.T. 737.

(16) *Court Line, Ltd.* v. *Dant & Russell Inc.*, [1939] 3 All E.R. 314 ; Digest Supp. ; 161 L.T. 35.

Appeal by the plaintiffs from a judgment of Tucker, J., dated Mar. 7, 1941, and reported [1941] 1 All E.R. 464. The facts are fully set out in the judgment of the court delivered by MacKinnon, L.J.

Linton Thorpe, K.C., and *Sebag Shaw* for the appellants.

G. O. Slade for the respondents.

Thorp, K.C. : The appellant company is not an alien company. Its offices are in a neutral country which has joined the Soviet Union. The judge has misdirected himself as to the effect of the contract. The contract provides that, in the event of war, there shall be a reasonable extension of time. Under the Sale of Goods Act, 1893, s. 10, time of payment is not deemed to be of the essence of a contract of sale unless a different intention appears from the terms of the contract itself. A term of the contract ought not to be struck out by the court. Unlike the plaintiffs in *Spence* v. *Chodwick* (10), the appellants in the present case have provided for the contingency of war. *Metropolitan Water Board* v. *Dick, Kerr & Co.* (11) has also to be distinguished from the present case, since in that case there was no express war clause; the machinery was sold by order of the Ministry; the contract was a measure-and-value contract, but in the present case a fixed sum was payable. In *Ertel Bieber & Co.* v. *Rio Tinto Co.* (12), German enemy aliens were part-owners. That point, however, does not arise in the present case. The contract in the present case does not contemplate the delivery of any goods to an enemy subject, and there is nothing in it which helps the enemy in any way. There is nothing in the contract which is contrary to public policy. The judge said that the contract had come to an end owing to the outbreak of war, and he based that view upon the Trading with the Enemy Act, 1939. That Act is not retrospective, and it does not in terms say that a contract is to be frustrated or shall become void. The respondents have not offered a reasonable extension of time. When war broke out, they claimed that the deposit was forfeited. [Counsel referred to *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (13) and *Chandler* v. *Webster* (1).]

Shaw, following on the same side: The contract in the present case was a c.i.f. contract, and the place of delivery was stated for the convenience of the buyers. If the place of delivery is for the benefit of the buyer, he is entitled to waive that requirement. The respondents would have received the whole purchase price, no matter where delivery was made. Therefore, the buyers were entitled to say that they would accept the machines in England. [Counsel referred to *Maine Spinning Co.* v. *Sutcliffe & Co.* (14).]

Slade: Frustration operates independently of the intention of the parties. It is an implied term of the contract that it is to be frustrated by the outbreak of war. The fact that there is an express term which appears to provide for the actual occurrence does not prevent frustration, even though the frustration is occasioned by something not envisaged at the time when the contract was made. The position must be gauged by the events at the time when the frustration occurred. War is of such a nature, and its duration is so uncertain, that it inevitably frustrates a contract. *F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (13), read with *Geipel* v. *Smith* (5), shows that, even where there is in the contract an express term dealing with war, nevertheless the contract will be determined, and not merely suspended, by the outbreak of war. In the present case, the matter crystallised once and for all on Sept. 23, 1939, and nothing which has happened since that date can have any effect on the legal position: *Hirji Mulji* v. *Cheong Yue S.S.Co.* (15). The parties may provide for what may happen in the event of frustration, but no such provision can have any effect where frustration occurs by operation of law: *Bank Line, Ltd.* v. *Capel (A.) & Co.* (2) and *Tatem, Ltd.* v. *Gamboa* (3). The argument put forward on behalf of the appellants that Wilno might have been freed in a few days is covered by *Court Line, Ltd.* v. *Dant & Russell Inc.* (16). It was a term of the contract that the appellants should pay £1,600 with the order. They paid £1,000 only. That was a default which entitled the respondents to treat the contract as at an end, and, although the respondents took the point that the contract was terminated automatically by operation of law, they have never waived their right to treat the contract as being at an end by reason of the non-payment of the balance of £600.

Thorp, K.C., in reply.

MacKinnon, L.J. [delivering the judgment of the court]: The plaintiffs are a corporation incorporated in happier times under the laws of Poland. They had, and perhaps have, a factory at Wilno, which we are told is in that part of Poland which has been occupied by the Russians. The defendants are manufacturers of textile machinery at Leeds. By an agreement in writing, dated July 12, 1939, the defendants agreed to manufacture for, and supply to, the plaintiffs two sets of heckling machines for flax at a total cost of £4,800. The material parts of the contract were as follows:

> (1) Terms of payment. Net by cheques on London, one-third with the order [that is, £1,600], balance against shipping documents. (2) Delivery 3 to 4 months from settlement of final details. (3) Packed and delivered c.i.f. Gdynia. (4) Including the services of a skilled *monteur* to superintend erection [presumably at Wilno]. (5) Subject to conditions of sale as per sheet attached hereto . . .

Of these the only material one appears to be cl. 7, which provides as follows:

> . . . should the despatch be hindered or delayed by . . . any cause whatsoever beyond our reasonable control, including . . . war . . . a reasonable extension of time shall be granted.

Then cl. 15 provides that the contract shall operate as a British contract and in conformity with British law.

On July 18, 1939, the plaintiffs paid £1,000 to the defendants' agents as part of the £1,600 due under the contract. The remaining £600 has never been paid by the plaintiffs. On Aug. 11, the defendants' agents wrote to the plaintiffs' agents reminding them that the £600 was due and should be paid. At the end of Aug., 1939, Germany invaded Poland. On Sept. 7, the plaintiffs' agents wrote to the defendants' agents as follows:

> Owing to the outbreak of hostilities it is now evident that the delivery of the machines for Poland cannot take place. Under the circumstances we shall be obliged if you will kindly arrange to return our initial payment of £1,000 at your early convenience.

On Sept. 8, the defendants' agents replied as follows:

> Considerable work has been done on these machines and we cannot consent to the return of this payment. After the war the matter can be reconsidered.

On Nov. 13, solicitors for the plaintiffs wrote to ask for "detailed particulars of the considerable work you allege has been done on these machines." On Dec. 1, the solicitors for the defendants wrote to the solicitors for the plaintiffs that two of the machines had been completed before the war. They went on to say that the defendants could sell all the machinery, " leaving them no loss arising from the non-performance of this contract," and asked the plaintiffs to concur in this disposal. Whether or not this proposal involved the return of the £1,000 was not made clear, but we gather that it did not.

On Dec. 15, the defendants' solicitors wrote that, in the absence of further communication from the plaintiffs, the defendants had to make their own decision. They went on to say that the contract had been dissolved by frustration on the outbreak of war, and that, under the principle laid down by *Chandler* v. *Webster* (1), the plaintiffs were liable to pay the balance of the £1,600 not yet paid. The assertion that the contract was at an end by frustration seems to be very much what the plaintiffs had asserted in their agents' letter of Sept. 7. Abortive discussions between the parties seem to have ensued. On Feb. 8, 1940, the plaintiffs' solicitors wrote to say that the factory for which the machines were bought was at Wilno, in Lithuania, a neutral country, that delivery c.i.f. Gdynia was only a convenient method, and not of the essence of the contract, and that the contract could be varied by delivery and erection of the machines at Wilno. The letter concludes as follows:

> Our clients recognise that under the present circumstances there may be a certain amount of delay . . . but they must insist upon the terms of the contract being carrried out and delivery of the machines to Wilno at as early a date as possible under the circumstances.

Nothing is said as to the £600, which ought to have been paid by the plaintiffs in July, 1939, and nothing is said as to how or when the rest of the £4,800 is to be paid, or as to the extra expense of delivery at Wilno. On Feb. 13, the defendants' solicitors reply that the points raised do not seem to affect the legal position, and " we must, therefore, leave your clients to take such steps as they may be advised." On May 1, 1940, the writ in this action was issued. It claimed (*a*) specific performance of the contract of July 12, 1939, or, alternatively, (*b*) return of the £1,000 and (*c*) further or other relief.

The statement of claim, dated Aug. 5, 1940, alleged that the defendants had broken the contract by refusing to deliver the machines, while " the plaintiffs are and have at all material times been ready and willing to take delivery and pay for the machines." It also stated that the plaintiffs had paid the £1,000 and the defendants claimed to retain it. The prayer of the claim was (i) for damages for breach of contract, (ii) for specific performance of the contract, or, alternatively, return of the £1,000, and (iii) for further or other relief. The defence of Aug. 26, 1940, alleged in effect that the contract had been frustrated by reason of the German invasion of Poland, and by reason of the German occupation of Gdynia on Sept. 23, 1939. It further alleged that the plaintiffs' failure to pay the £600 balance of the £1,600 was a repudiation of the contract, which the defendants accepted, and that the contract was thereby also terminated. There was apparently no reliance at the trial on this plea, and it was, no doubt, a bad one. On Feb. 27, 1941, the plaintiffs delivered a reply in which they alleged as follows :

> . . . that since Sept., 1939, the plaintiffs have at divers times stated and have at A all times been ready and willing to take delivery of the said machinery in England.

The action, upon these pleadings, was heard by Tucker, J., on Mar. 6, 7, 1941. No evidence was called on either side, but the correspondence was read, and, as we were told, certain admissions were made by counsel. What those admissions were is not recorded anywhere. In the course B of his judgment, Tucker, J., said, at p. 465 :

> It is also agreed that, before the repudiation by the defendants [which appears to mean before the defendants wrote the letter of Dec. 15, 1939], the plaintiffs were willing to take delivery of these goods either at Riga or at Leeds, in England, instead of insisting upon delivery c.i.f. Gdynia, which was the place of delivery under the contract.

C This appears to be the willingness referred to in the reply. There is no trace of any such offer in the correspondence. In the absence of any record of what was agreed or admitted by counsel at the trial, we have nothing except this statement by the judge. Counsel for the respondents D said that he could not remember what he admitted, but he could not deny that something was said to justify the judge's recital.

Upon these facts, the judge entered judgment for the defendants. The claim for specific performance was obviously a hopeless one. The plaintiffs were in breach as to the payment of the £600, and that fact alone E would be sufficient to debar any claim for specific performance against the defendants.

There remained (i) the claim for damages for breach of contract, or, alternatively, (ii) the claim for return of the £1,000. The judge held (i) that there was no breach of contract by the defendants, the contract F having been terminated by frustration in Sept. 1939, and (ii) that, under the doctrine of *Chandler* v. *Webster* (1), the plaintiffs could have no claim for the return of the £1,000. Logically, upon that, if the defendants had put in a counterclaim, they might have had judgment against the plaintiffs for the £600, but there was no such counterclaim. G We think that the judge was right in his decision. It was argued that there could be no frustration by reason of the German-Polish war, because cl. 7 of the contract provided that, should despatch be delayed by, *inter alia*, war, " a reasonable extension of time shall be granted." There cannot, it was said, be frustration by an implied term of the H contract when its terms have expressly provided for the contingency which is said to have caused the frustration. This seems to be the argument which was unsuccessfully urged in several cases, notably in *Bank Line, Ltd.* v. *Capel (A.) & Co.* (2), and more recently in *Tatem, Ltd.* v. *Gamboa* (3). Indeed, its unsoundness is implicit in the much earlier decision of *Jackson* v. *Union Marine Insurance Co., Ltd.* (4). In the charter-party there in question there was an exception of perils of the sea, but the contract was nevertheless held to have been terminated by an overwhelming disaster within that category.

In this case the parties provide for an extension of time if war produces a minor delay so as to require " a reasonable extension." Clearly in this case the war and its effect were not of that character, and a war in which the countries of both contracting parties are engaged, even as allies, is not likely to be of that character. As was said by Lush, J., in *Geipel* v. *Smith* (5), at p. 414 :

> . . . a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this.

Therefore, we think that the judge was clearly right in holding that, despite the reference to war in this contract, it was terminated by frustration in Sept., 1939. In other words, the plaintiffs were right in the view they expressed in their letter of Sept. 7 :

> Owing to the outbreak of hostilities it is now evident that the delivery of the machines for Poland cannot take place.

The next contention of the plaintiffs was that, though the defendants could not perform the contract according to its agreed terms, they could carry out the delivery of the machines to the plaintiffs in a different manner, either by shipment to Riga, or, as is suggested in para. 3 of the reply, by handing them to the plaintiffs at Leeds. This involves the proposition that, if a contractor is relieved from the obligations of his contract, but in such circumstances that he can take some action which will confer the same benefit on the other contractor as if the actual contract could be carried out, he is bound to take that other action, and is liable for damages if he fails to do so. This appears to be a quite impossible proposition, and is so completely unfounded that it is not worth discussion at any length. This is a c.i.f. contract, and the rigour of the obligations of such a contract is well-settled. If a man sells c.i.f. June shipment and tenders a bill of lading dated July, the buyer can treat the contract as broken, and it is in vain for the seller to say that the goods are just as good as they would be if shipped a week earlier. If an embargo or prohibition prevented shipment abroad, the buyer could not possibly say : " You can buy these goods in this country and deliver them to me here, and, if you do not carry out that different obligation, I can claim damages."

Finally, there is the claim for the return of the £1,000. Tucker, J., held that, having regard to the principle laid down in *Chandler* v. *Webster* (1), and other like cases, this claim must fail. We think that he was right, and, further, that that principle must equally bind this court to reject the claim. Whether the principle can be overruled is a matter which can only concern the House of Lords.

Incidentally, we may say that the doctrine of frustration by virtue of an implied term in the contract is a modern exposition of the law. Probably it was first clearly enunciated in *Taylor* v. *Caldwell* (6) in 1863, when the court recognised the existence of an implied term, of which earlier judges (notably LORD ELLENBOROUGH in *Atkinson* v. *Ritchie* (7) in 1809) had denied the possibility. If the rule, so discovered or enunciated in 1863, had added as part of the implied term a provision that a party to the contract who by part performance had received a benefit should compensate the other for that benefit, it might well have been thought a reasonable addition. It is not without interest to observe that this was the unsuccessful argument for the defendants in *The Teutonia* (8), at p. 405. One suspects that it may have been suggested by junior counsel for the defendants.

The Scottish law, as laid down in *Cantiare San Rocco, S.A.* v. *Clyde Shipbuilding & Engineering Co., Ltd.* (9) differs from the English law as laid down in *Chandler* v. *Webster* (1). If the House of Lords should hold that *Chandler* v. *Webster* (1) was wrongly decided, and that the English law is in truth the same as the Scottish, it does not follow, of course, that the plaintiffs can claim the whole £1,000. In the *Cantiare* case (9) the party who had paid the first instalment was held entitled to recover it "subject to such counterclaim as might be established for work done under the contract," and the EARL OF BIRKENHEAD, at p. 235, indicates as the principle that the recipient of the money must return it to the amount by which he had in fact been enriched by it. We know nothing of the work done by the defendants on these machines, or how they disposed of them, or to what extent the £1,000 has been a pure windfall to them. If the House of Lords find themselves able to overrule *Chandler* v. *Webster* (1) and substitute a rule like the more civilised rule of Roman and Scottish law, presumably some inquiry will be necessary to determine how much of the £1,000, if any, the defendants ought to restore to the plaintiffs. So far as we are concerned, however, these are academic considerations. and it is only open to us to say that this appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *A. Kramer & Co.* (for the appellants); *Maxwell, Batley & Co.*, agents for *Simpson, Curtis & Burrill*, Leeds (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BARRETT AND RUSSELL'S GRAVESEND BREWERY, LTD. v. GRAVESEND ASSESSMENT COMMITTEE.

[King's Bench Division (Humphreys, Singleton and Tucker, JJ.), **May 1, 8, 1941.**]

Rates—Proposal for amendment—Alteration in value since commencement of rating year—Time at which value to be ascertained—Rating and Valuation Act, 1925 (*c.* 90), *s.* 37 (1) (7) (10).

On Jan. 24, 1940, the rating authority made a proposal to increase the rateable value of certain licensed premises founded on the decision of the House of Lords in *Robinson Bros. (Brewers), Ltd.* v. *Durham County Assessment Committee* (1). The occupier and the owners gave notice of objection to that proposal, stating that the value of the premises had been reduced by circumstances arising out of the war, and asked that that should be taken into consideration in fixing the rateable value. The hearing before the assessment committee took place on Mar. 18, 1940, and the new assessment would take effect as from Apr. 1, 1939. It was contended that the committee could not take into consideration any increase or decrease in value occuring after Apr. 1 1939. In the circumstances of this case, the result of giving effect to this contention would have been that an increase in value due to the decision in the House of Lords, which was given in 1938, would have had to be given effect to, whereas no consideration could have been given to any decrease in value due to the war, since that would have occurred since the commencement of the war in Sept., 1939:—

Held: the duty of the assessment committee was to determine what a hypothetical tenant would pay for a yearly tenancy at the date when the proposal was considered, taking into account all circumstances existing at that date. They ought, therefore, in this case to have given effect to any decrease in value due to the war.

[**EDITORIAL NOTE.** The decision in this case is of considerable importance to ratepayers, since it establishes the principle that, where an objection is made to a proposal to amend a valuation list, the assessment committee is not limited to consideration of the position as at the commencement of the rating year, but is free to have regard to everything material which has been raised in the objection, notwithstanding that this involves consideration of events which have occurred subsequent to the commencement of the rating year and prior to the date of the proposal for amendment.

As to Proposal for Amendment, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484, 485, para. 913; and for Cases, see DIGEST, Vol. 38, pp. 582, 583, Nos. 1159-1169.]

Cases referred to:

(1) *Robinson Bros. (Brewers), Ltd.* v. *Durham County Assessment Committee (Area No. 7)*, [1938] A.C. 321; Digest Supp.; 158 L.T. 498; *sub nom. Robinson Bros. (Brewers), Ltd.* v. *Houghton & Chester-le-Street Assessment Committee*, [1938] 2 All E.R. 79; 107 L.J.K.B. 369.

(2) *Barking Borough Rating Authority* v. *Central Electricity Board*, [1940] 2 K.B. 493; [1940] 3 All E.R. 477; Digest Supp.

Case Stated by agreement under the Quarter Sessions Act, 1849, s. 11, by order of Asquith, J., by way of an appeal from a decision, dated Mar. 18, 1940, by the Gravesend Assessment Committee approving a proposal of the rating authority to increase the assessment on the India Arms Tavern, Northfleet. The proposal was made in pursuance of the policy of increasing the assessments on licensed houses based on the decision of the House of Lords in *Robinson Bros. (Brewers), Ltd.* v. *Durham County Assessment Committee* (1), and would take effect from Apr. 1, 1939. The objection taken was that the war and its effects on the trade of the house had seriously decreased its value, and, it was argued, should have been taken into consideration when the committee considered the proposal.

H. B. Williams for the appellants.

Frederick Grant for the respondents.

SINGLETON, J. [delivering the judgment of the court]: The appellants are the occupier and the owners, respectively, of a public-house known as the India Arms Tavern, Northfleet, within the assessment area of the respondents. On Jan. 24, 1940, the rating authority made a proposal to amend the valuation list by inserting the figures £94 gross and £75 rateable value in place of the existing figures £50 and £40. This was to bring the assessment into line with the decision of the House of Lords in *Robinson Bros. (Brewers), Ltd.* v. *Durham County Assessment Committee (Area No. 7)* (1). The proposal might have been made much earlier, as the decision in the *Robinson* case (1) was given on Mar. 17, 1938. It was not disputed that there ought to be an increase, nor was the amount of the increase due to the *Robinson* decision (1) in issue between the parties. The appellants, however, gave notice of objection to the proposal upon the grounds that the values proposed were excessive, incorrect and unfair, in that no regard had been had to the change in conditions affecting the value caused by the present war.

The case was heard by the respondent assessment committee on Mar. 18, 1940, and the assessment committee allowed the proposal and determined the values as £94 gross and £75 rateable value, thus declining to accept the submission that regard must be had to the changed conditions due to the war. The case is stated under the Quarter Sessions Act, 1849. The point at issue might have been put in simpler form.

The India Arms Tavern is to a considerable extent dependent for its trade upon persons connected with shipping on the River Thames. The outbreak of war in Sept., 1939, and the conditions resulting therefrom, diminished the value of the hereditament. The question must be determined by reference to the Rating and Valuation Act, 1925, s. 37. Certain old authorities were cited to us, but it is to be remembered that the Act of 1925 established a new code of procedure in an effort to simplify the law, and that it is to the Act itself that one must now look. Sect. 37 of the Act deals with the revision or amendment of current valuation lists, and subsect. (1) provides that any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force may make a proposal for the amendment of the list. If the person who is aggrieved is the occupier or ratepayer, his grievance is probably that his assessment is too high. It may be too high because the figure originally inserted in the valuation list was too high and he did not lodge an objection under sect. 26, or it may be too high because A of some change in the circumstances since the approval of the valuation list under sect. 28. In either case, the occupier is a person aggrieved. It is for him to show incorrectness or unfairness, and, if he does so, he is *prima facie* entitled to relief.

It was argued on behalf of the assessment committee that a person B was not to be considered as aggrieved within the meaning of sect. 37 (1) unless his grievance existed on Apr. 1 immediately preceding the date of the proposal. Clearly there is nothing in subsect. (1) itself lending support to such an argument. So far as the subsection goes, all that the person making a proposal has to show is that he is aggrieved by the C incorrectness, and so forth. Sect. 37 (7) was called in aid, and it was said that the provision that the assessment committee were to hear and determine a proposal as if it were an objection to a draft list indicated that it was to be dealt with as though it were made at the commencement of the year, on Apr. 1. If there were anything in this argument, D however, it would take one back, not to the commencement of the year, but to the commencement of the current valuation list, which might be three or four years earlier. In our view, subsect. (7) provides only procedure, and nothing more.

Then reliance was placed on sect. 37 (10), which provides in general E that an amendment made in the valuation list under the provisions of sect. 37 (1) shall be deemed to have effect as from the commencement of the period in respect of which the rate was made—that is, normally from Apr. 1 immediately preceding the proposal. The proviso to the subsection makes an exception in the case of a newly-erected F hereditament or a hereditament which has been structurally altered, and in such cases the amendment in the list is to take effect as from the date when the newly-erected hereditament comes into occupation, or as from the date of the happening of the event giving rise to the alteration in value. G

It is to be observed that in the cases covered by the proviso there is a definite date on which it can be said that the alteration in value takes place. In other cases, there is no such definite date, and the legislature had to provide what should be done. The simple thing is to take the beginning or the end of the period in respect of which the rate was made. H Either might have been taken. Subsect. (10), apart from the proviso, fixed the date as from the commencement of the period. It is said that this results in an anomaly, and yet, if it is examined, it will be seen to lead to as equitable a result as would appear possible. A change in the value of a hereditament which is due, not to structural alterations and the like, but to a change of circumstances, usually takes place somewhat gradually, and a proposal for the amendment of the list is seldom, if ever, lodged on the day on which the changed circumstances commence to operate. The making of a new road may change the value of a public-house, and so may the demolition of property near the site, the building A and occupation of new property, and the incidence of war, leading, perhaps, to the closing of certain routes. In many of such cases, the change is not seen or appreciated at once, and has been going on for some time before a proposal is made. For that reason, if for no other, the altered value should be dated back rather than forward. In this connection, B it is most important to remember that proposals under sect. 37 can be made by the rating authority and by the county valuation committee, as well as by the ratepayer. It is not a one-sided arrangement. One of the objects of the Act was to promote uniformity, and this is but an illustration of that.

C In our view, subsect. (10) does not help towards the construction of subsect. (1) which is clear of itself. The person making the proposal must satisfy the assessment committee that he is aggrieved. He may be aggrieved by the fact that the value as stated in the valuation list has been too high since the commencement, or he may be aggrieved by the D fact that, on the date of his proposal, his assessment is too high. Equally, the rating authority would be aggrieved within the subsection if they showed that the original figure was too low, or that, for one reason or another, it had become too low.

It is interesting to see that this was the view expressed in KONSTAM E ON THE MODERN LAW OF RATING, chapter XIV, pp. 246, 247, published in 1927, shortly after the passing of the 1925 Act. I will read two extracts. The first is as follows, at p. 246:

> A proposal may be made whether the correction desired is one which ought to have been made when the list itself was first made or whether it is due to a change of circumstances that has taken place since that time.

F

A little later, it is said, at p. 247:

> The right of proposal is therefore equally wide with the right of objection and is open to the same persons and authorities. There are no limiting words; and any point in which a valuation list fails to represent or has ceased to represent fairly and correctly the values and other particulars that it ought to contain can be set right by means of a proposal.

G

We see nothing to support the argument on behalf of the assessment committee that there can be no amendment or alteration of the figures unless the alteration in value had taken place by or before Apr. 1. So to construe subsect. (1) would be introducing limiting words which are not H to be found in the section.

Barking Borough Rating Authority v. *Central Electricity Board* (2) was cited to us as showing that GODDARD, L.J., at p. 497 ([1940] 3 All E.R. at p. 483), in giving the judgment of the Court of Appeal, said that the accounts of the board up to Apr. 1, 1934, were relevant, and that those subsequent to that date were irrelevant. That decision gives no help on the point before us. The court in that case decided that the profits basis was the proper mode of assessment, in the absence of any special circumstances, and that the profits basis must be calculated on the profits ascertained down to the latest period before the date of the rate or the making of the valuation list. It is clear from the judgment, at p. 495 ([1940] 3 All E.R. at pp. 482, 483), that the dispute between A the parties was as to the value of the hereditament on Apr. 1, 1934, and no point arose such as that which we have to decide.

The proposal in the present case was made by the rating authority, who thereby put forward the view that the figures should be increased. The occupiers gave notice of objection, rather in the nature of a set-off. B It was then the duty of the assessment committee to consider the case and to weigh all the relevant matters. One was the increase which ought to be made by reason of the decision in the *Robinson* case (1), and another was the fact that the hereditament, in view of its situation, was affected adversely by the outbreak of war. On consideration of C these and all other relevant matters, it was for the assessment committee to determine what rent a hypothetical tenant would pay on Jan. 24, 1940, the date of the proposal, for a yearly letting.

Appeal allowed with costs. Leave to appeal to the Court of Appeal.

Solicitors: *Godden, Holme & Ward* (for the appellants); *Watkins,* D *Pulleyn & Ellison,* agents for *H. H. Brown,* Town Clerk, Gravesend (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

ROADWAYS TRANSPORT DEVELOPMENT, LTD. *v.* ATTORNEY-GENERAL.

[CHANCERY DIVISION (Farwell, J.), **May 6, 13, 1941.**]

Royal Forces—Army—Impressment—Vehicles—Motor vehicle subject to hire-purchase agreement—Payment to owner—Payment to person in possession of vehicle—Army Act, ss. 113, 115.

The plaintiff company owned a vehicle which they had let on a hire-purchase agreement, under the terms of which they had become entitled to retake possession. On Oct. 24, 1939, whilst the vehicle remained out of their possession, it was impressed, pursuant to an emergency requisition under the Army Act, s. 115. Payment was made by the Army Council to the company from whose possession they had requisitioned the vehicle. No evidence was given as to how the vehicle came into the possession of this company. The plaintiffs claimed payment for impressment of the vehicle. The Army Council contended that the payment had been effected, as payment made to the possessor was payment " to the owner " within the meaning of the Army Act, s. 113 (4):—

HELD: the application of sect. 113 (4) was limited to impressment under sects. 112 and 113 of the Act, *i.e.*, for the removal of regimental baggage and stores along a particular route, and that subsection could not be inserted into sect. 115, which dealt with impressments under a state of emergency generally. Sect. 113 (4) was, moreover, inconsistent with sect. 115 (4), which states that payment " shall be deemed to have been tendered when a formal receipt . . . is handed to the owner or his representative." Therefore, no payment had, in the circumstances of this case, been made to the owner of the vehicle.

[**EDITORIAL NOTE.** The question in this case, although of much importance at the present time, is purely one of the construction of the relevant statutory provisions. It is, perhaps, fortunate that the vehicle here in question was the subject of a hire-purchase contract, which is so often the case at the present time with motor vehicles of all kinds.

AS TO IMPRESSMENT OF VEHICLES, see HALSBURY, Hailsham Edn., Vol. 28, p. 564, para. 1163; and FOR CASES, see DIGEST, Vol. 39, p. 327.]

ADJOURNED SUMMONS to determine whether payment made on Oct. 24, 1939, to the possessor of a vehicle was payment to the owner within the meaning of the Army Act. The facts are fully set out in the judgment.

G. G. Honeyman for the plaintiffs.

H. O. Danckwerts for the defendant.

FARWELL, J.: This summons raises a question the answer to which depends wholly, I think, on the true construction to be placed on two or three sections of the Army Act. The facts really are not in any way in dispute. An affidavit filed on behalf of the plaintiffs and made by a director of that company states as follows:

> By an agreement in writing dated June 22, 1939, the company let a 1939 Bedford motor truck, registered No. EUR 884 on hire-purchase to Turner & Riches of 1 Rye Street, Bishops Stortford, upon the terms *inter alia* that the said truck remained the sole and absolute property of the company until the hirer should pay the total rent payable under the said agreement and should exercise the option to purchase therein contained.

The hire-purchase agreement is exhibited, but there is nothing in it to which I think I need refer specially, except that it does provide, as it says in the affidavit, that the property in the truck remains in the plaintiff company until the whole of the instalments have been paid. In addition to the deposit mentioned in the agreement, Turner & Riches paid to the company, prior to the impressment hereinafter mentioned, one instalment only of the rent under the agreement. By the provisions of the hire-purchase agreement, and in the events which have happened :

> . . . the company were entitled on and after Aug. 29, 1939, to retake possession of the said motor truck.

Then para. 5 of the affidavit states as follows :

> I am informed and verily believe that on or about Oct. 24, 1939, pursuant to a requisition of emergency under the Army Act, s. 115, a warrant for the provision of the said truck for the purpose of its being purchased was issued and served upon A. Hutchin (Haulage), Ltd., of 1 Rye Street, Bishops Stortford, who had then, unknown to the company, possession of the said truck. I am further informed and verily believe that at the time of the said impressment it was declared to the impressment officer, Captain T. Arden White, that the said truck was subject to a hire-purchase agreement and that the company were the owners thereof.

Then there is produced a document entitled " Receipt for one vehicle impressed for purchase for His Majesty's Forces," dated Oct. 24, 1939. That document is a printed document, with the blanks in it filled in with writing by the officer in question. It is headed : " Receipt for one vehicle impressed for purchase for His Majesty's Forces." The first portion of that document contains the name of the person from whose possession the vehicle was taken—namely, A. Hutchin (Haulage), Ltd. That, as stated in the affidavit, was the company in whose possession the truck was at that date. How it got into their possession, or what sort of title they thought they had to the truck, does not appear, but the fact remains that it was on the premises of A. Hutchin (Haulage), Ltd., at the time of the impressment, and that it was impressed for the use of His Majesty's Forces from the premises of that company. Then the address of the company is given, and the description of the vehicle is " One truck." The number of the truck is given, with the maker's name, the carrying capacity, the type of body, and the condition of the vehicle at the time of impressment. I need not read any of those particulars. Then there follow these words :

> Three hundred and eighty pounds—including delivery. Ordered to be delivered to His Majesty's Forces as under.

Then there follows Aldershot as the address to which it is to be delivered, after which the forms proceeds thus :

> Particulars of ownership as provided by the person from whom impressed.

Under (*a*), it says :

> If person from whom impressed is *not* the owner, give name and address of owner below.

Nothing has been filled in there. There is a blank space. On the other side, however, which is (*b*), these words appear :

> In case of *dual ownership* or *hire-purchase*, give name and address of other interested party or hire-purchase company below.

Then there is given the name of the plaintiffs, Roadways Transport Development, Ltd., with their address in London. Then there are certain remarks, and the signature of the officer in question is added with his name and rank, and the place and date given is Bishops Stortford, Oct. 24, 1939. Then at the bottom of the printed form there are these words:

> Payment will be made to you by the Command Paymaster, Eastern Command, London, S.W.1. No claim need be made. Sect. 113 (4) of the Army Act provides that " In the event of the property being vested in another person or persons, the possessor shall notify all others interested in the property and adjust the amount received in due proportion. In the event of any difference arising, the amounts shall be apportioned on a certificate of a county court judge as aforesaid ".

Then the last paragraph of the affidavit states as follows:

> I am informed and verily believe that on or about Oct. 26, 1939, the Army Council caused the sum of £380, being the assessed value of the said truck, to be paid to A. Hutchin (Haulage), Ltd. No sum has been paid to the company in respect of the said truck by or on behalf of the Army Council.

That is the whole of the evidence given on behalf of the plaintiffs, and that evidence is in no way contradicted.

The affidavit by the defendant is made by the officer, Captain John Arden White, who states as follows:

> 1. On Oct. 24, 1939, I was an officer duly authorised to impress vehicles on behalf of His Majesty's Principal Secretary of State for the War Department under the Army Act. On that date in pursuance of the Army Act a Bedford motor truck the registered number of which was EUR 884 and which was then in the possession of A. Hutchin (Haulage), Ltd., of 1 Rye Street, Bishops Stortford, was required to be delivered to His Majesty's Forces at No. 1 Vehicle Collecting Centre, Aldershot. 2. In accordance with the instructions issued by the Army Council I completed Army Form A 2032 [the form already referred to]. True copies of the four parts so completed by me are now produced and shown to me . . . I was informed that the plaintiffs were the owners of the said truck and that it was the subject of a hire-purchase agreement and I filled in the name of the plaintiffs in para. (13) (*b*) of the said form. Each of the four parts of the said form is identical except that the footnotes containing instructions to the persons to whom the parts are transmitted vary. The part marked " original " is left with the person by whom the vehicle is furnished. The second part is sent to the officer commanding the unit or establishment to which the vehicle is delivered. The third part is sent to the Command Paymaster, Eastern Command, as the authority responsible for the payment of compensation, and the fourth part is retained by the impressment officer. I duly handed the original to A. Hutchin (Haulage), Ltd., who so far as I was aware, were in lawful possession of the said truck. 3. The third copy of the said form was duly forwarded to the Command Paymaster, Eastern Command, and I am informed and believe that on Oct. 26, 1939, the sum of £380, being the amount of the compensation for the said truck as assessed by me was sent by the said Command Paymaster to A. Hutchin (Haulage), Ltd. I am informed and believe that the said truck was duly delivered to His Majesty's Forces at No. 1 Vehicle Collecting Centre, Aldershot.

Thus, on the facts, which are quite simple, and which, as I say, are not in dispute, it appears that in Oct., 1939, the truck in question was in the possession of A. Hutchin (Haulage), Ltd. How that truck came into their possession, as I have said, does not appear from the evidence, and, I imagine, is not known to either the plaintiffs or the defendant. So far as appears from the evidence, that company had no title whatsoever to the truck, the ownership of which was subsisting in, and remained in, the plaintiff company.

In those circumstances, the plaintiff company, having received no compensation for the impressment of the truck, issued this summons, making His Majesty's Attorney-General the defendant, in which they ask for the determination of the following question :

> Whether on a true construction of the Army Act and on the facts of this case, the payment made on Oct. 26, 1939, by or on behalf of the Army Council to A. Hutchin (Haulage), Ltd., in respect of a Bedford motor truck (registered No. EUR 884) is to be deemed to be a payment made to the owner or owners of the said vehicle.

Then they ask for the costs of this application to be provided for.

At an early stage in these proceedings I inquired whether it was necessary for the proper determination of the question raised that the person in whose possession the truck was when it was impressed, or the company who had it in their possession and who had actually received compensation for it, should be a party to this summons before the court. Counsel on each side assured me that there was no necessity to add that company as a party, because it was said that, as far as this company was concerned, no claim of any sort is made against that company. The only question raised is as between the plaintiffs and the defendant Army Council, the question being whether payment has been made or compensation has been given to the persons who ought to have received it, who, it is said on behalf of the plaintiffs, are the plaintiff company. It is said that, if I decide in favour of the plaintiffs, whatever results may follow from that as between the Army Council and anyone else and the company in whose possession the truck was, that is not a question which need be considered in these proceedings. So far as these proceedings are concerned, there is no claim of any sort made against the haulage company. I eventually permitted the summons to proceed without amendment, and I am proposing to decide the question on that summons, but I am bound to say that I still think that it would have been very much more convenient had the third party been before the court, in order that any order which might be made should be binding, not only on the parties to this summons, but also on the person or company who in fact had received the compensation. It would, of course, be open to the company who had received the compensation to say that my decision in this case is in no sense binding on them, and it may be possible for them to put forward some further argument which might persuade the court to come to a conclusion different from that to which I have come. As I have said, although I think that it would have been more convenient, I do not think that I ought to refuse to deal with the summons as it stands at the present moment.

The question, as I have said, depends wholly on the true construction of one or two sections of the Army Act, and it is that part of the Army Act which relates to the impressment of carriages and animals. The first of these sections is sect. 112, which provides as follows :

> (1) Every justice of the peace in the United Kingdom having jurisdiction in any place mentioned in a route issued to the commanding officer of any portion of the regular forces shall, on the demand of such commanding officer, or of an officer or non-commissioned officer authorised by him, and on production of such route, issue his warrant requiring some constable or constables having authority in such place to provide, within a reasonable time to be named in the warrant, such carriages, animals, and drivers as are stated to be required for the purpose of moving the regimental

> baggage and regimental stores of the forces mentioned in the route in accordance with the route; and the constable or constables shall execute such warrant, and persons having carriages and animals suitable for the said purpose shall, when ordered by a constable in pursuance of such warrant, furnish the same in a state fit for use for the aforesaid purpose. (2) The route for the purpose of this section shall be such route as is mentioned in the foregoing provisions of this part of this Act with respect to billeting . . .

Then there follows a provision in subsect. (3) as follows:

> A route purporting to be issued and signed as required by these provisions, if delivered to an officer or non-commissioned officer by his commanding officer, shall be a sufficient authority to such officer or non-commissioned officer to demand carriages and animals in pursuance of this Act, and when produced by an officer or non-commissioned officer shall be conclusive evidence to a justice and constable of the authority of the officer or non-commissioned officer producing the same to demand carriages and animals in accordance with such route.

Then the section continues as follows:

> (4) The warrant ordering carriages, animals and drivers to be provided shall specify the number . . .

Then there is a provision in subsect. (5) that, in the event of there not being sufficient carriages or animals to be

> . . . procured within the jurisdiction of the said justice, any justice having jurisdiction in the next adjoining place shall, by a like course of proceeding, supply the deficiency . . .

It goes on to say that a fee shall be paid for the warrant, and then subsect. (7) deals with details to which I need not refer. Then sect. 113 provides as follows:

> (1) There shall be paid in respect of carriages and animals furnished in pursuance of the foregoing section of this Act the rates of payment commonly recognised or generally prevailing in the district at the time of impressment, and if any difference arises respecting the amount payable, the amount shall be such as may be fixed by a certificate of a county court judge having jurisdiction in any place in which the carriage or animal was furnished or through which it travelled.

I think that it is quite clear, as far as this sect. 113 is concerned, that at this stage, at any rate, it refers directly again to the form of impressment to which the Army Council is entitled to have resort under sect. 112—namely, the power to impress horses, carts and other vehicles, upon a given route, for the purpose of moving the regimental baggage and regimental stores of the forces. Then subsect. (2) of that section provides as follows:

> For the purposes of fixing such amount the provisions set out in the sixth schedule to this Act shall have effect.

When one turns to Sched. VI, one sees a side-note, "Sect. 113," and then:

> Provisions as to determining amount to be paid for articles requisitioned.

Then para. 3 provides as follows:

> In the case of impressment for hire, the amount fixed by the certificate shall be such amount as appears to the county court judge to be a fair rate of hire . . .

I need not read it in detail. Then sect. 113 (4) provides as follows:

> The possessor of any carriage or animal at the time of impressment shall be deemed to be the owner for the purposes of the procedure of impressment where it is not otherwise declared at the time, and payment made to the possessor shall be deemed to be payment to the owner. In the event of the property being vested in another person or persons, the possessor shall notify all others interested in the property and adjust the amount received in due proportion. In the event of any difference arising, the amounts shall be apportioned on a certificate of a county court judge as aforesaid . . .

Then there are two further paragraphs to which I do not think it is necessary for me to refer, and sect. 114 has provisions to which again I do not think I need refer in detail. Sect. 115, an important section for this purpose, provides as follows:

> (1) His Majesty by order, distinctly stating that a case of emergency exists, and signified by a Secretary of State . . . may authorise any general or field officer commanding the regular forces in any military district or place in the United Kingdom to issue a requisition under this section (hereinafter referred to as a requisition of emergency). A

It is not disputed that, at the time when this particular truck was requisitioned, a state of emergency existed. Then subsect. (2) provides as follows: B

> The officer so authorised may issue a requisition of emergency under his hand reciting the said order, and requiring justices of the peace to issue their warrants for the provision, for the purpose mentioned in the requisition, of such carriages and animals as may be provided under the foregoing provisions, and also of carriages of every description and of horses of every description, whether kept for saddle or draught, and also of vessels . . . C

Then there follow other words which I need not read. Then subsect. (3) provides as follows:

> A justice of the peace, on demand by an officer of the portion of His Majesty's Forces mentioned in a requisition of emergency, or by an officer of the Army Council authorised in this behalf, and on production of the requisition, shall issue his warrant for the provision of such carriages, animals, vessels, food, forage and stores as are D stated by the officer producing the requisition of emergency to be required for the purpose mentioned in the requisition . . .

Then there follow certain provisions with regard to the form of the warrant. Then subsect. (3A) provides as follows:

> A requisition of emergency may authorise any officer mentioned therein to require E any carriages and horses furnished in pursuance of this section to be delivered at such place (not being more than 100 miles in the case of a mechanically-propelled carriage or trailer, and not being more than 10 miles in the case of any other carriage or any horse, from the premises of the owner) and at such time as may be specified by any officer mentioned in the requisition, and in such case it shall be the duty of a constable executing a warrant issued by a justice of the peace under this section upon the demand of an officer producing the requisition of emergency to insert in his order such time and place for delivery of any vehicle or horse to which F the order relates as may be specified by such officer, and the obligation of owners to furnish carriages and horses shall include an obligation to deliver the carriages and horses at such place and time as may be specified in such order notwithstanding that a receipt may be given by the officer mentioned in the warrant at the time of impressment, and the provisions of this Act shall have effect as if reference therein to the furnishing of carriages and horses included, as respects any such carriage or horse as aforesaid, delivery at such time and place as aforesaid . . .

G

Then subsect. (4) provides as follows:

> The sum to be paid for any article shall be deemed to have been tendered when a formal receipt for the article setting forth the amount is handed to the owner or his representative; but the property in a carriage or animal impressed shall be vested in the owner until such time as the carriage or animal has been duly furnished at the place and time stipulated.

H

I do not think it is necessary for me to refer to any other subsection of sect. 115, or to any other section of the Army Act.

As appears from the form which was given to the person in whose possession the truck was, it seems to have been assumed on behalf of the Army Council that sect. 113 (4) applies to every case of impressment, in whatever circumstances that impressment may be made, and that, accordingly, in every case the Army Officer is not concerned to see that the owner of the chattel receives the purchase money, but that payment can be made to the possessor for the time being, who shall be deemed to be the owner for the purposes of the particular impressment, and payment A made to the possessor should be deemed to be payment to the owner. I am quite unable to accept that view. It seems to me that there is no justification for taking a subsection out of sect. 113 and applying it to the various other sections which deal with impressment under different circumstances from those contemplated by sect. 112 and sect. 113. B Moreover, to do so seems to me to be quite inconsistent with sect. 115 (4), which provides as follows :

> The sum to be paid for any article shall be deemed to have been tendered when a formal receipt for the article setting forth the amount is handed to the owner or his representative . . .

C In the present case, the person who was in possession of the truck was not the owner, nor can it be suggested, as I understand it, that he was the owner's representative. He was a person who was in possession of the truck. How he came into possession of it, or what right he had to possession of it, does not appear. He was not the hirer under the hire-D purchase agreement, and he was certainly not the representative of the owner for the purpose of receiving money or taking a receipt, or anything of that kind. It seems to me that sect. 113 (4) is dealing with a form of impressment which is distinct from the form of the particular kind of impressment with which sect. 115 deals. Sections 112 and 113 deal with E the impressment of vehicles for the purpose, and for the purpose only, as I read the Act, of removing the regimental baggage and regimental stores along a particular route. I think that, when that duty has been performed and the articles have been moved by the vehicle which has been impressed, the purposes for which the vehicle was impressed have F come to an end. That is a case, as it seems to me, in which the appropriate compensation for the use of the vehicle would be some compensation paid by way of hire as contemplated in Sched. VI. In sect. 115, a totally different position is being considered. In order to give the Army the right to impress under that section, there must be—and this again is G quite distinct from sect. 112—a state of emergency. Moreover, it is not a case in which a vehicle is impressed for some particular purpose, as under sect. 112. It is a case of impressing a vehicle for use generally by His Majesty's Army, and the compensation to be paid for the vehicle is the sum at which the officer in question assesses the compensation having H regard, no doubt, to the capital value of that which has been requisitioned. As I have said, I cannot myself see any justification for importing into sect. 115 a subsection of sect. 113, which, it seems to me, is dealing with a totally different state of affairs. As I said before, it seems to me that the attempt to import that subsection into sect. 115 not only does not seem to be just, but also seems to me to be inconsistent with the provisions contained in sect. 115 (4), which in terms provides for payment, or, rather, for the sum to be paid, which is deemed to have been tendered when a formal receipt for the amount is handed to the owner or his representative.

It is quite impossible, in my judgment, to read that subsection as meaning the owner or person who is in possession, leaving the person in possession to adjust the rights of the parties between themselves. I appreciate that the effect of my decision may be extremely inconvenient from the point of view of the Army Council. It may be that they have no intention of taking upon themselves, and have no desire to take upon themselves, what may be a difficult question to determine in some cases—namely, who is the owner of the vehicle impressed—but it does not seem to me that they are justified by sect. 113 (4) in impressing a vehicle and handing a receipt for the purchase price to the man who happens to be in possession at the time, leaving the man to receive that money, without regard to the true owner of the vehicle. That seems to me to be quite inconsistent with what was contemplated by sect. 115 (4), which is the section dealing with this particular form of requisition. It seems to me that it must necessarily follow that the payment in this particular case, having regard to the form of impressment, was one which should have been made to the plaintiff company, and, the plaintiff company not having received payment, they are now in a position to say that they have not received any compensation for their vehicle, and that it is no concern of theirs that some other unauthorised person, not the representative of the owner, has received some sum of money in respect of this particular vehicle.

The point is really a very short one, although no doubt it is one of considerable importance. It may be that the matter may go further and other views may prevail, but, so far as I myself am concerned, I am wholly unable to understand what possible justification there is for inserting sect. 113 (4) into sect. 115, which, as I have said, deals with another state of things, and which, so far as sect. 115 (4) goes, seems to me to be quite inconsistent with the provisions of sect. 113 (4). In these circumstances, I must make a declaration that, on the true construction of the Army Act, and on the facts of this case, the payment made on Oct. 28, 1939, by or on behalf of the Army Council to A. Hutchin (Haulage), Ltd., is not to be deemed to be a payment made to the owner or owners of the vehicle in question.

Declaration in favour of the plaintiffs with costs.

Solicitors: *Kimber Bull, Howland, Clappe & Clarke* (for the plaintiffs); *Treasury Solicitor* (for the defendant.)

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

HEIRS OF PRINCE MOHAMED SELIM *v.* ATTORNEY-GENERAL OF PALESTINE.

A [PRIVY COUNCIL (Viscount Sankey, Lord Atkin, Lord Thankerton, Sir George Rankin and Clauson, L.J.), **March 11, 12, April 28, 1941.**]

B *Privy Council—Palestine—Recovery of lands—Rectification of land registry—Onus of proof—Disagreement of two judges—Procedure—Land Court Rules*, 1921, *r.* 2—*Establishment of Courts Orders*, 1924-1931—*Court Amendment Ordinance*, 1939—*Land* (*Settlement of Title*) *Ordinance*, 1928-1939.

C D The appellants, the heirs of Prince M.S., himself one of the heirs of the late Sultan Abdul Hamid II of Turkey, sought in the Land Court of Jaffa to recover lands said to have been the private property of the Sultan, and to have the land registry of Gaza rectified by inserting their names in respect of their share of the property in place of the High Commissioner for the time being in trust for the government of Palestine, who had obtained registration under the Land (Settlement of Title) Ordinance, 1928-1939. The court decided that the onus was upon the defendant to prove his title, but upon going into the case the two judges, who constituted the court, differed. The Land Court Rules, 1921, r. 2, provided that in case of disagreement the court could call in any magistrate or member of the District Court or a cadi as a third member. The Establishment of Courts Orders, 1924-1931, provided that the Court should consist of two or more judges :—

E HELD : (i) the Land Court Rules, 1921, r. 2, is not still operative. When an ordinance has prescribed without reserve that the court shall consist of two or more judges, it is impossible that a rule should survive which prescribes that, in a certain event, the court shall consist of two judges and a non-judge.

(ii) the Land Court were in error in placing the onus of proof upon the respondent, who was entitled to rely on his registered title until displaced.

F [**EDITORIAL NOTE.** The dominant principle of land registration is that the registered proprietor is the true owner of the land. If his title is to be attacked it is clearly upon the attacker to show that the title is bad and not for the registered owner to prove his title to the land. The presumption is that he has been properly placed upon the register.

G AS TO RECTIFICATION OF REGISTER, see HALSBURY, Hallsham Edn., Vol. 27, p. 801, para. 1361 ; and FOR CASES, see DIGEST, Vol. 38, pp. 756, 757, Nos. 909-911.]

H APPEAL by the plaintiffs from a judgment of the Supreme Court of Palestine setting aside a judgment of the Land Court at Jaffa in favour of the appellants and directing a new trial. The facts are fully set out in the judgment of their Lordships delivered by LORD ATKIN.

A. T. Miller, K.C., and *Colin H. Pearson* (for *G. C. Dunbar* on war service) for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Norman Bentwich* for the respondent.

LORD ATKIN : This is an appeal from a judgment of the Supreme

Court of Palestine setting aside a judgment of the Land Court at Jaffa in favour of the appellants and directing a new trial. Special leave to appeal was given by His Majesty in Council, but in the order it was provided that the appeal was to be confined to the grounds of the judgment of the Supreme Court. Within this limited scope, it will be possible to deal shortly with this appeal. The suit was brought by the plaintiffs, the heirs of Prince Mohamed Selim, himself one of the heirs of the late Sultan Abdul Hamid II of Turkey, to recover lands said to have been the private property of the late Sultan, and to have the land registry at Gaza rectified by inserting the names of the plaintiffs in respect of their share of the property in place of the High Commissioner for the time being in trust for the Government of Palestine. It would appear that the land in question was registered in the land register for Gaza in the name of the late Sultan from about 1886. The respondent's case is that, after the deportation of the late Sultan, the Ottoman government by various decrees took the property in this land, and that, following the Treaty of Peace made in Lausanne in 1923 the government of Palestine acquired the land. The government by various ordinances proceeded to a settlement of this and other land in Palestine, and this land was eventually entered in the new register as in the proprietorship of the High Commissioner in trust for the government of Palestine. The suit of the plaintiffs was heard in May, 1937, before the two judges of the Land Court of Jaffa (CRESSALL and DAOUDI, JJ.), who first proceeded to determine upon whom lay the onus of proof. They both agreed that the onus was upon the defendant, the representative of the government, to support his title. Having so determined, they then proceeded to hear the case, and, after a hearing of six or seven days, proceeded, to deliver considered judgments, CRESSALL, J. holding that the defendant had failed to discharge the onus upon him, and DAOUDI, J., holding that he had succeeded. Having arrived at this unfortunate position, the two judges proceeded, after argument, to decide what the result should be. They were referred to the Land Court Rules, 1921, r. 2, which provides as follows :

> (1) The Land Court shall, save as hereinafter provided, consist of a British judge as president and a Palestinian member. (2) In case of disagreement the court may call in any magistrate or member of the District Court or a cadi as a third member.

They refused to act on this rule, holding that it had been impliedly repealed by the Establishment of Courts Orders, 1924-1931, which provided without any saving that the Land Court of Jaffa should be constituted by the president of the District Court of Jaffa or a relieving president and one or more judges of the District Court of Jaffa. Such an ordinance, they considered, was inconsistent with a rule which provided that, in the case of disagreement, the Court might be constituted by two judges and a magistrate or cadi. In any case, they held that the rule was facultative only, and not imperative, and in this particular case, they would not have followed it. They proceeded, therefore, to determine the case, and agreed that, as the defendant had to satisfy the court, and had only succeeded in satisfying one member of the court, he had failed in the suit, and they proceeded to pass a decree in favour of the plaintiffs.

On appeal, the Supreme Court disagreed with the views expressed as to r. 2. They held that the rule was still in force, and was imperative. The Land Court, therefore, had not passed a valid judgment, and there must be a new trial. They also held that the Land Court were in error in placing the onus upon the defendant. The grounds of the judgment, therefore, which emerge as being those with which alone this Board are empowered to deal on the terms of the order giving leave to appeal are : (i) is the Land Court Rules, 1921, r. 2, still operative ? and (ii) was the onus of proof rightly placed upon the defendant ? Their Lordships will be careful to decide nothing more.

On the first point, their Lordships accept the reasoning of the Land Court. When an ordinance has prescribed without reserve that the court shall consist of two or more judges, it seems impossible that a rule should survive which prescribes that, in a certain event, the court shall consist of two judges and a non-judge, whether magistrate or cadi. At the time of the decision, no provision had been made for the event of disagreement, and it was thus impossible to rule that there was an imperative obligation to call in a third judge. Fortunately, this position has now been remedied, first by the Court Amendment Ordinance No. 2, 1939, s. 6 (*a*), which expressly provides for the event of disagreement in a civil court, and further by the Land Courts Amendment Ordinance, 1939, by which Land Courts are constituted of a president or relieving president of a District Court, or of a British magistrate's court, or of a magistrate's court, dependent upon the value of the subject-matter in dispute. The interesting question as to what judgment should be given where the party upon whom the onus of proof rests satisfies one of two judges composing a court and fails to satisfy the other does not form one of the the grounds of the judgment of the Supreme Court, and, therefore, is not now discussed.

On the second question, however, their Lordships are clearly of opinion that the Supreme Court are right. The matter can be disposed of by reference to two sections of the Land (Settlement of Title) Ordinance, 1928-1939, under which a new register of title was opened :

> 43. Save as provided in this ordinance, the registration of land in the new register shall invalidate any right conflicting with such registration.
>
> 66. After the completion of the settlement, rectification of the register may be ordered by the Land Court, subject to the law as to limitation of actions, either by annulling the registration or in such other manner as the court thinks fit where the court is satisfied that the registration of any person in respect of any right to land has been obtained by fraud or that a right recorded in the existing registers has been omitted or incorrectly set out in the register, provided that where a person has since the settlement acquired land in good faith and for value from a registered owner the court shall not order a rectification of the register.

The argument of the plaintiffs was, shortly : " Our title is on the existing register. That constitutes a presumption in our favour. Our title was omitted from the new register. Therefore, there is a presumption in favour of our right to rectification." It can only be said that so to hold would be to eliminate for practical purposes the effect of sect. 43, which, as in most provisions for the registration of title, is the keystone of the whole structure. Until the register is rectified, the old title fails, and the register can only be rectified by showing that the entries on it A are wrongly on it by fraud or mistake. The word " omitted " in sect. 66 means wrongly omitted, and the onus is quite plainly upon the party seeking rectification to show that the entry which is *prima facie* right ought not to be there. In the result, the Land Court were wrong in placing the onus on the defendant, who was entitled to rely on his registered title B until displaced. The only possible remedy appears to be the new trial ordered by the supreme Court. The decision of the judges of the Land Court was obviously vitiated by their misdirection of themselves as regards onus, and, in view of the fact that there is only an appeal on a question of law, and that the determination of the dispute appears to C involve questions of fact as well as of law, no other decision could be adopted. It is, of course, unfortunate that several days of the former trial should prove wasted. Possibly the parties may succeed in arranging that some at least of the evidence already given should be read at the new trial. In any case, however, a new trial appears inevitable. For D the above reasons, their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal to His Majesty in Council.

Appeal dismissed with costs.

Solicitors : *Bischoff, Coxe & Co.* (for the appellants) ; *Treasury Solicitor* E (for the respondent).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

SYWELL AERODROME, LTD. *v.* CROFT.

[KING'S BENCH DIVISION (Lawrence, J.), **May 2, 9, 1941.**]

Income Tax—Schedule B—Profits arising from ownership and occupation of land—Aerodrome—Activities ancillary to main purpose—Income Tax Act, 1918 (*c.* 40), *Sched. A, Sched. B, Sched. D.*

S.A., Ltd., owned an aerodrome at Sywell, in the county of Northampton, known as Sywell Aerodrome, part of which they leased to B.A., Ltd., together with the sole right to use and occupy a service hangar and the sole right to sell petrol and execute repairs to aircraft using the aerodrome. S.A., Ltd., also received income from the rent of two clubhouses leased to N.A.C. and E.M.F.C., respectively. The company also received income from garage rents, housing and landing fees in respect of other aircraft using the aerodrome, and a percentage of the money obtained by a company from the sale of ice cream. They also collected the landing fees payable by casual users of the aerodrome. The company's profits had already borne tax under Sched. A and Sched. B. The Revenue contended that the profits should also be assessed under Sched. D after deduction of the amounts of the Sched. A and Sched. B assessments :—

HELD : the land was used primarily for landing and taking off in aeroplanes. For this purpose land was essential. The only activities distinct from the occupation of land—namely, the repair of aeroplanes the sale of petrol and the sale of ices—were ancillary to the main purpose of the aerodrome. The land was, therefore, occupied within the meaning of Sched. B, and the income was derived from such occupation, and not from a separate and distinct operation unconnected with the occupation of land. The profits of the company were not, therefore, liable to be taxed under Sched. D.

[**EDITORIAL NOTE.** AS VISCOUNT DUNEDIN pointed out in the *Salisbury House* case (1), an assessee may be liable to tax under Sched. A and also under Sched. B, which says in terms that the amount there is to be in addition to the assessment made under Sched. A, though the underlying subject is the same; but, once these assessments are made, no assessment can be made under Sched. D in respect of the same subject-matter. Therefore, it is essential in these cases to determine whether the income arises primarily from the occupation of land or whether it arises out of a trade carried on independently of such occupation. In the latter case only are the profits liable to be assessed under Sched. D. In the present case, it is held that the land was used principally as an aerodrome, and that the other activities which the company carried on were purely ancillary to that main purpose, and it could therefore be said that all the profits arose out of the ownership and occupation of land, and, consequently, no assessment could be made under Sched. D.

AS TO OCCUPATION FOR THE PURPOSES OF SCHED. B, see HALSBURY, Hailsham Edn., Vol. 17, p. 65, para. 125 ; and FOR CASES, see DIGEST, Vol. 28, pp. 15, 16, Nos. 75-83.]

Cases referred to :

(1) *Fry* v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.*, [1930] A.C. 432 ; Digest Supp. ; 99 L.J.K.B. 403 ; 143 L.T. 77 ; 15 Tax Cas. 266 ; *affg.*, [1930] 1 K.B. 304.

(2) *Glanely* (*Lord*) v. *Wightman*, [1933] A.C. 618 ; Digest Supp. ; 102 L.J.K.B. 456 ; 149 L.T. 121 ; 17 Tax Cas. 634.

(3) *Carlisle & Silloth Golf Club* v. *Smith*, [1913] 3 K.B. 75 ; 28 Digest 17, *90* ; 82 L.J.K.B. 837 ; 108 L.T. 785 ; 6 Tax Cas. 198.

(4) *Coman* v. *Rotunda Hospital, Dublin* (*Governors*), [1921] 1 A.C. 1 ; 28 Digest 82, *462* ; 89 L.J.P.C. 162 ; 123 L.T. 529 ; 7 Tax Cas. 517.

(5) *Carnoustie Golf Course Committee* v. *Inland Revenue Comrs.*, [1929] S.C. 419; Digest Supp.; 14 Tax Cas. 498.
(6) *Inland Revenue Comrs.* v. *Stonehaven Recreation Ground Trustees*, [1930] S.C. 206; Digest Supp.; 15 Tax Cas. 419.
(7) *Smith* v. *York Race Committee*, [1934] 1 K.B. 517; Digest Supp.; 103 L.J.K.B. 518; 151 L.T. 52; 18 Tax Cas. 541.
(8) *Back* v. *Daniels*, [1925] 1 K.B. 526; 28 Digest 15, *74*; 94 L.J.K.B. 304; 132 L.T. 455; 9 Tax Cas. 183

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Northampton Borough (First District) in the county of Northampton for the opinion of the King's Bench Division of the High Court of Justice.

Sywell Aerodrome, Ltd., appealed to the Commissioners for the General Purposes of the Income Tax Acts against an estimated assessment to income tax made upon the company by the Additional Commissioners of Income Tax under the Income Tax Act, 1918, Sched. D for the year 1937-38 in respect of aerodrome profits. The company owned freehold land situate at Sywell in the county of Northampton and laid out as an aerodrome, known as Sywell Aerodrome. On Apr. 9, 1936, the company let for a period of four years from June 10, 1936, to Brooklands Aviation, Ltd., of Brooklands Aerodrome, Byfleet, Surrey, (i) the large hangar, repair hangar, lecture rooms and certain other premises, (ii) the kitchen, R.A.F. reserve messroom and lounge, and eight bungalows, and (iii) the right to use for the flying purposes of an R.A.F. school of flying, and in common with all other users thereof, the fields comprising the Sywell Aerodrome. The company also granted to Brooklands Aviation, Ltd., in consideration of a payment of a yearly sum, the sole right to use and occupy a service hangar and the sole right to sell petrol and execute repairs to aircraft using the aerodrome. Income was also received from the rent of two clubhouses to two flying clubs, such rent entitling the members of the respective clubs to use the aerodrome for flying purposes. The company also received income from the garage rents, housing and landing fees in respect of other aircraft using the aerodrome and a percentage of the money obtained by a company from the sale of ice cream. The company were responsible for keeping the aerodrome landing grounds in order, and advertised in their own name the facilities provided at the aerodrome. They were licensed by the Air Ministry to carrry on an aerodrome, and paid the licence and inspection fee. The company was assessed to income tax under Sched. A for the whole of its property, including that leased to Brooklands Aviation, Ltd., and the two clubs referred to above. The total of the original assessments under Sched. A and Sched. B amounted to £574, but additional assessments were raised, bringing the total to £754 3*s*.

The contentions on behalf of the appellant company were as follows:

(*a*) They did not carry on any trade in respect of which they were assessable under Sched. D. (*b*) The company's profits arose from the ownership and occupation of land and were assessable to income tax only under Sched. A and Sched. B of the Income Tax Act, 1918. (*c*) The excess of the rents over the annual value of the land as assessed under Sched. A was not taxable. (*d*) The assessment under Sched. B in respect of the area of land comprised in the aerodrome exhausted the liability to tax in respect of the occupation of this land. (*e*) Alternatively, if any profits arose to the company otherwise than from the ownership and occupation of lands, the company were assessable under Sched. D only in respect of such part as was attributable to such other matters.

The contentions on behalf of the Crown were as follows:

(*a*) In respect of all their activities the company were carrying on a trade, and some part of the company's income was profits of that trade assessable to income tax under Sched. D, Case I. (*b*) Alternatively some part of the company's income was profits or gains not falling under any other case of Sched. D and not charged by virtue of any other schedule, and was consequently assessable to income tax under Sched. D, Case VI. (*c*) In either event:—(1) As regards the rent paid by Brooklands Aviation, Ltd., it was in fact paid partly for premises assessable under Sched. A and partly for other matters. (2) Such part of the rent as was not paid for premises assessable under Sched. A was a receipt of the company to be taken into account in arriving at its liability under Sched. D. (3) In the absence of evidence showing what part of the rent was specifically paid for premises assessable under Sched. A and for other matters, respectively, so much of the rent as was equivalent to the annual value of the premises should be regarded as paid in respect of the premises, and the balance should be regarded as paid in respect of matters other than the premises, and should be taken into consideration in arriving at the liability under Sched. D subject, however, to a deduction of the amount of the Sched. B assessments. (4) The sums received by the company in respect of the grant of the sole right to use the service hangar and the sole right to sell petrol and execute repairs to aircraft using the aerodrome, and in respect of the garage rents, housing and landing fees and the percentage on the sale of ice cream referred to above were receipts of the company to be considered in arriving at their liability under Sched. D. (5) That part of the rents received from the two clubs other than Brooklands Aviation, Ltd., which was attributable to the right given to the members thereof to use the aerodrome for flying purposes was receipts of the company to be taken into consideration in arriving at their liability under Sched. D.

The Commissioners held that there was a liability under Sched. D, Case VI, whereupon the company expressed dissatisfaction with the commissioners' decision as being erroneous in point of law, and the inspector of taxes also expressed dissatisfaction with the decision on the ground that there was a liability under Sched. D, Case I. The company appealed and the inspector of taxes cross-appealed.

J. S. Scrimgeour for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

LAWRENCE, J.: This is an appeal from the General Commissioners for Northampton, who have decided that the appellant company were under a liability under Sched. D, Case VI, in respect of their profits from their aerodrome which had already borne tax under Sched. A and Sched. B. The figures were left to be agreed, and have been agreed. The appellant company own, and to some extent occupy, an aerodrome on which stand various buildings. They hold a licence from the Air Ministry under the Air Navigation Act, 1920, licensing the aerodrome for public use. They have granted a lease to Brooklands Aviation, Ltd., of certain buildings, and the right to use the aerodrome for a flying-school, in common with the public use of it for flying purposes. They have also granted Brooklands Aviation, Ltd., the sole right to use a service hangar and the sole right to sell petrol and execute repairs to aircraft using the aerodrome.

Income was also received by the appellant company from rent of two clubhouses, one of which was used by the members of the Northamptonshire Aero Club (carried on by Brooklands Flying Club, Ltd.) and the other by the East Midlands Flying Club (formerly the Northamptonshire Aviation Club), such use including the right of the respective members to use the aerodrome for flying purposes. The appellant company also receive income from the garage rents, housing and landing fees in respect of other aircraft using the aerodrome, and a percentage of the money obtained by a company from the sale of ice cream. The company also collect the landing fees payable by the casual users of the aerodrome other than Brooklands Aviation Co., Ltd. The company are responsible for keeping the aerodrome landing ground in order, and have advertised in their own name the facilities provided at the aerodrome.

On these facts, it is contended for the appellants that the tax under Sched. A and Sched. B exhausts their liability to income tax. It is clear, I think, from *Fry* v. *Salisbury House Estate, Ltd.* (1) and *Glanely* (*Lord*) v. *Wightman* (2) that income derived from the occupation of land within the meaning of Sched. B can only be taxed under that schedule, except in the cases where the taxpayer exercises the option given to him in certain cases to be taxed under Sched. D. The question then is whether the appellants' occupation of the land is occupation within the meaning of Sched. B or whether in addition they carry on a concern in the nature of trade, which is a separate and distinct operation unconnected with the occupation of land. It is clear, I think, from the opinions of the House of Lords in *Fry* v. *Salisbury House Estate, Ltd.* (1) and *Glanely* (*Lord*) v. *Wightman* (2) and from the judgment of Romer, L.J., in *Glanely* (*Lord*) v. *Wightman* (2) that land is occupied within the meaning of Sched. B when its occupation is the source of the income sought to be taxed, whether that income is derived from the fruits of the soil or from animals which feed upon the fruits of the soil or from the use of the soil for pleasure, for every occupier of land is taxable under Sched. B on his lawn, his tennis-court or his woodlands as upon his farm, though not on the same amount. The tax is assessed conventionally on the annual value or a third thereof, and the actual amount of income derived therefrom is irrelevant. For that reason, the income derived from Lord Glanely's horse Grand Parade was taxed no higher than would have been the income derived from a cart gelding which might have grazed in the same paddocks. Similarly, in my opinion, the occupier of a tennis-court would be liable to the same tax whether he merely used the court for himself and his friends or let it out to other people to play on.

The use of land for an aerodrome seems to me to stand upon the same footing as the use of land for a lawn, a tennis-court, a running track or a racecourse. The profit or pleasure is derived from the occupation of the land which is essential to the activity carried on there, and is not unessential as the occupation of land is to poets, painters and the others mentioned by Romer, L.J., in *Glanely* (*Lord*) v. *Wightman* (2).

However, the question is whether the views I have expressed are consistent with cases which have been decided on similar facts and which have not been expressly overruled by the House of Lords. The closest of these seems to me to be *Carlisle & Silloth Golf Club* v. *Smith* (3), in which it was held by Hamilton, J., and the Court of Appeal that a members' golf club which, by the terms of the lease under which it occupied the course, had to admit members of the public to play on payment of green fees was carrying on a concern in the nature of trade, and was liable under Sched. D. It is to be observed that no reference was made to Sched. B in this case, and Lord Buckmaster thought the case of no assistance in *Glanely* (*Lord*) v. *Wightman* (2). However, the decision was approved by the House of Lords in *Coman* v. *Rotunda Hospital, Dublin* (*Governors*) (4), decided before *Fry* v. *Salisbury House Estate, Ltd.* (1) and *Glanely* (*Lord*) v. *Wightman* (2). Similar decisions have been arrived at with reference to a golf course, a recreation ground and a racecourse in *Carnoustie Golf Club Committee* v. *Inland Revenue Comrs.* (5), where a committee representing a town council and local golf clubs managed the course in question, and were held liable to tax under Sched. D on the balance of profits and gains derived from green fees in *Inland Revenue Comrs.* v. *Stonehaven Recreation Ground Trustees* (6), where trustees who managed a recreation ground on which games were played on payment for tickets were held liable under Sched. D, and in *Smith* v. *York Race Committee* (7), where the committee, who were assessed under Sched. D on their racecourse, were contending that they were not liable to tax under Sched. B on their lawns and enclosures, on the ground that they were part of the buildings occupied for the trade of a racecourse, and it was held that they were liable under Sched. B. In the *Carnoustie case* (5) and in the *Stonehaven* case (6), Sched. B was not mentioned, and in the *York* case (7) no objection was made to the assessment under Sched. D, and the *Salisbury House* case (1) and *Glanely's* case (2) were not cited. With the greatest respect to the judges who decided these cases without the assistance of the opinions of the House of Lords in the *Salisbury House* case (1) and *Glanely's* case (2), I am of opinion that, upon the principles stated in those cases, golfing and recreation by way of other games or racing are occupations of land within the meaning of Sched. B, and that any profits derived from carrying them on cannot be regarded as derived from separate and distinct operations unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, and, therefore, liable to assessment under Sched. D: *per* Scrutton, L.J., in *Back* v. *Daniels* (8), at p. 544, approved by Lord Wright in *Glanely* (*Lord*) v. *Wightman* (2), at p. 637. Does the Sywell Aerodrome stand on a different footing? The land is used primarily for the purpose of landing and taking off in aeroplanes. For that purpose, land is at present essential. No doubt, it may be a more profitable form of occupation of land than farming, but so may keeping thoroughbred stallions. The amount of the profit is irrelevant, except in so far as it affects the annual value. The only activities in the present case which, I think, might be said to be different from the occupation of land are the repair of aeroplanes, the selling of petrol and the selling of ices; but, in my view, these activities are merely ancillary to the main purpose of the aerodrome, just as there may be manifold activities in husbandry, such as the repair and fuelling of mechanical vehicles. Nor do I think that the licence of the Air Ministry or the public right makes any difference. The appellants in substance sell the landing rights to the public, just as a farmer sells the fruits of the soil, but, whereas the farmer may sell the fruits of the soil off his farm, here, from the nature of the subject-matter, the landing rights and the petrol and ices are disposed of on the aerodrome. Therefore, I have come to the conclusion, though not without doubt, that, on the principles laid down in the House of Lords as to the true construction of Sched. A and Sched. B, this appeal ought to be allowed.

Appeal allowed with costs. Cross-appeal dismissed with no order as to costs.

Solicitors: *Oswald Hickson, Collier & Co.*, agents for *Ray & Vials*, Northampton (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

Dictum of Farwell, J., at p. 334, *applied. Re* Ridley (*decd.*). [1950] 2 All E.R. 1.

Re ROWE, BENNETTS *v.* EDDY.

[Chancery Division (Farwell, J.), **May 15, 1941.**]

Executors—Administration—Liability of real estate for payment of legacies—Administration of Estates Act, 1925 (c. 23), *s.* 34 (3), *Sched. I, Part II, paras.* 1, 2.

The testator by his will gave certain pecuniary legacies. Clause 5 of the will was in these terms: "I devise all my real estate and bequeath all the residue of my personal estate to the said J.P.J. and J.D.P. in equal shares." The personalty was insufficient to pay these pecuniary legacies, and it was contended that, by virtue of the Administration of Estates Act, 1925, s. 34, together with the provisions of Sched. I, Part II, the legacies were payable rateably out of the real and personal estate not otherwise specifically devised or bequeathed:—

Held: the Act did not alter the law as it was before 1926, and, since the testator had not created a mixed fund or given his personalty and realty as a mass, the legacies were payable out of the personalty only.

[**EDITORIAL NOTE.** The contention here is that the Administration of Estates Act, 1925, s. 34 (3) and Sched. I, Part II has altered the rule of administration in force before 1925 and rendered legacies payable out of personalty and realty as out of a mixed fund. The matter was considered in a different connection in *Re Thompson, Public Trustee* v. *Husband* (2) and the conclusion there reached is here adopted and followed.

AS TO LIABILITY OF REAL ESTATE FOR PAYMENT OF LEGACIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 384-386, paras. 713-717; and FOR CASES, see DIGEST, Vol. 23, pp. 496-498, Nos. 5621-5640.]

Cases referred to:

(1) *Greville* v. *Browne* (1859), 7 H.L. Cas. 689; 23 Digest 508, *5740*; 34 L.T.O.S. 8.

(2) *Re Thompson, Public Trustee* v. *Husband*, [1936] Ch. 676; [1936] 2 All E.R. 141; Digest Supp.; 105 L.T. Ch. 289; 155 L.T. 474.

(3) *Re Boards, Knight* v. *Knight*, [1895] 1 Ch. 499; 23 Digest 510, *5758*; 64 L.J. Ch. 305; 72 L.T. 220.

SUMMONS to determine whether pecuniary legacies payable under the will of the testator, James Rowe, were payable out of the real and personal estate of the testator not otherwise specifically devised or bequeathed. The facts are fully set out in the judgment.

J. A. Wolfe for the plaintiff.

G. E. Timins for the first and second defendants.

R. W. Goff for the third and fourth defendants, infants.

Raymond Jennings for the fifth and sixth defendants.

FARWELL, J.: This summons raises a question which I do not think is wholly free from difficulty. It is primarily a question of construction of the will of James Rowe, who made his will on Nov. 3, 1938, and died on Oct. 23, 1939. The will is a short one, and is reasonably plain in its language. In cl. 1 he revokes all former wills. In cl. 2 he appoints two executors, one of whom is a devisee of the real estate and one of the persons who share the residue of the personal estate. In cl. 3 he gives to a named person certain specific chattels. In cl. 4 he gives pecuniary legacies to various named persons. Clause 5 provides as follows:

> I devise all my real estate and bequeath all the residue of my personal estate to the said James Phillips junior and John Davey Phillips in equal shares.

Clause 6 is not material to anything I have to consider. That is the whole of the testator's will.

The estate of the testator has turned out in this way. The testator left both real and personal estate. The personal estate is insufficient to satisfy the pecuniary legacies given by the will. The question which I have to determine is whether those pecuniary legacies are properly payable only out of personal estate as far as it will go, or whether they are payable rateably out of the real and personal estate of the testator not otherwise specifically devised or bequeathed. It is a little important to remember what the law was with regard to this matter before the Administration of Estates Act, 1925, came into operation. It is not disputed, nor could it be disputed, that, under the law as it existed before 1926, the pecuniary legatees in this particular case could not look to the real estate at all for any part of the payment of the legacies. The only way in which the real estate could be made liable for the payment of the legacies would have been if the testator had created a mixed fund or given the real and personal estate as a mass to the residuary pecuniary legatees, in which case the pecuniary legacies would have been payable out of that mixed fund. Apart from that, the real estate would not have been liable for the payment of pecuniary legacies, and they would A have had to abate as far as the personal estate was insufficient to satisfy them. The rule, usually known as the rule in *Greville* v. *Browne* (1), is stated thus in HAWKINS ON WILLS, 3rd Edn., p. 342 :

> If legacies are given generally and the residue of the real and personal estate is afterwards given in one mass, the legacies are charged on the residuary real as well as the personal estate. B

Taking the rule as it is there stated, it is to be seen that, where the residue is not given in one mass, then, apart from express words charging real estate with the payment of pecuniary legacies, the real estate is not charged with payment of the legacies, and the legatees can look only to the personal estate for payment of their legacies. That is the rule which C is well-established, and until 1926 there could have been only one answer to this summons—namely, that the real estate of the testator was not in any way liable to pay the pecuniary legacies. In this case, it cannot be suggested, and it is not suggested, that the testator has done anything to make a mixed fund or to dispose of his real and personal estate, after D payment of the gifts given by the earlier part of the will, in one mass. He has dealt with them quite separately. When he comes to deal with his property, after having given these specific pecuniary legacies, he treats the real and personal estate as quite separate. He says :

> I devise all my real estate and bequeath all the residue of my personal estate . . . E

Thus, as the law was until 1926, there cannot be any doubt that the pecuniary legacies would have to abate so far as the personal estate is insufficient to pay them.

It is said—and this is the real point in this case—that the effect of the F Administration of Estates Act, 1925, has been to alter the law as it existed before the Act came into force, and it is said that the alteration is effected by sect. 34 of that Act together with the provisions in the schedule. Sect. 34 (3) provides as follows :

> Where the estate of a deceased person is solvent [that is this case] his real and personal estate shall, subject to rules of court and the provisions hereinafter contained G as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act.

Accordingly, one has to look at Sched. I, Part II, to see what the order is. Part II is headed "Order of application of assets where the estate is H solvent," and para. 1 provides as follows :

> Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.

That has no application to the present case, because here no part of the property is undisposed of. Then para. 2 provides as follows :

> Property of the deceased not specifically devised or bequeathed but included

> (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

Then the schedule continues as follows :

> 3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts. 4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts. 5. The fund, if any, retained to meet pecuniary legacies.

It is said that the effect of Part II, para. 2, is to alter the law as it was before that Act came into force, so that the real estate, although not given as a mass with personal estate to the person entitled to the estate of the testator, nevertheless must bear a proportion of the pecuniary legacies, and that the fund which is available out of which the pecuniary legacies are payable must be treated as not only the disposed of personal estate, but must also include any real estate which is not given to the person who takes the residuary personal estate.

In my judgment, the first thing which it is necessary to do in order to solve that question is to see exactly what is the true construction of the will in this case. The language of cl. 5 is especially noticeable, because the testator devises all his real estate and bequeaths all the residue of his personal estate. Therefore, obviously, he is not creating a mixed fund or treating the personal estate and real estate as one mass. He is devising the real estate and giving the residue of the personal estate, and beyond all doubt, in my view, before the 1925 Act came into operation the effect would inevitably have been that the real estate would not in any way have been chargeable with the payment of pecuniary legacies. If that is so, has the Act of 1925 altered that ? Was the Administration of Estates Act, 1925, intended to alter the law as it was then and to substitute for it a new provision under which the pecuniary legacies would be charged, not only on the residuary personal estate, but also on the real estate ?

The matter is not free from difficulty, nor is it, as far as I know, exactly covered by authority. The only case to which I have been referred which has any bearing on this question at all is *Re Thompson, Public Trustee* v. *Husband* (2), the headnote of which is as follows :

> A testator bequeathed an annuity and certain legacies and devised and bequeathed all his real and personal estate not otherwise devised or bequeathed to certain persons. He left personal estate and real estate of considerably greater value. Questions arose in connection with the incidence of certain death duties, whether an annuity and legacies were for that purpose to be treated as payable primarily out of the residuary personalty or out of the realty and personalty in proportion to their values:—HELD, that the law in force before the Administration of Estates Act, 1925, as regards the primary fund for payment of legacies as between the personal and real estate has not been altered by sect. 34 (3) or Sched. I, Part II, paras. 2, 8 (*b*), of that Act, and that the personal estate must be treated as primarily liable, and recourse will not be made to the real estate until the personal estate has been exhausted.

That case, of course, does not decide the question which I am asked to decide, but I think it throws a little light upon it, because in that case CLAUSON, J., does consider para. 2 of the schedule, and, after having quoted it, says, at p. 682 ([1936] 2 All E.R. at p. 145) :

> The last words mean, so far as not provided for out of the part of the estate as to which the testator died intestate. It is suggested that the effect of that provision

> is to alter the law, and to provide that the fund which is to be retained out of residuary realty and personalty in order to meet pecuniary legacies is to be retained in the following way : that a proportionate part is to be retained out of realty and personalty *pro rata* of the amount of the realty and personalty respectively. The provision does not say so, and the provision is not concerned with any such matter. The provision is concerned with the way in which funeral testamentary and administration expenses, debts and liabilities are to be met. There is no indication there that there is any intention of altering the law in respect of the rights of the legatees as against those interested in the residuary personalty and residuary real estate, or in respect of the rights *inter se* of those interested in the residuary realty and personalty respectively, as regards bearing the charge of legacies, and I can see no foundation for the suggestion that that provision has in any way altered the law as laid down in *Re Boards, Knight* v. *Knight* (3).

Thus, when considering the particular question which he had to consider in that case, CLAUSON, J., did not accept the view that this provision in the Administration of Estates Act, 1925, had in any way altered the law as it was before the Act came into force. I think that that has some little bearing on the question I have to consider. Ought I to take the view, which CLAUSON, J., took, that this was not intended to alter the law as it stood before the Act came into force, or is the effect of the provision in the Act that the law has been altered and the rule in *Greville* v. *Browne* (1) no longer applies ? As I have said, primarily the question I have to decide is a question of construction of a particular will. Does the residue consist of the real estate and personal estate which had not already been disposed of, or is there a specific devise of all real estate and a gift of the residue of the personal estate to the two named persons ? I have come to the conclusion, although with some considerable difficulty, that the Administration of Estates Act, 1925, does not alter the law as it was before that Act came into operation. It seems to me that that decision is really in accordance with the principle which CLAUSON, J., adopted in *Re Thompson, Public Trustee* v. *Husband* (2), and I ought not, I think, to read the language of the Administration of Estates Act, 1925, as intending to alter the existing law, and, accordingly, in this particular case, the property of the deceased not specifically devised or bequeathed for the purpose of that section does not include the real estate which is devised, not as part of the residue, but as a specific devise to the named persons, the residue which is given being the residue of the personal estate.

If that be the true construction of this gift, then the effect of it is that only so much of the personalty as is available can be applied in payment of pecuniary legacies, and the persons who are given the real estate take it free from any liability to contribute towards the pecuniary legacies. I think, as I have said, that this is not at all an easy question to answer, and it may well be that it is a matter which would strike other minds in ways other than those in which it has struck mine. I can only give effect to what I think is the true result of the language of this particular will and the construction put upon the Administration of Estates Act, 1925, and I have come to the conclusion on the whole that the liability as laid down in *Greville* v. *Browne* (1) has not been altered, and that, accordingly, as there is in this case not a residuary estate which consists of a mixed fund or one mass of real estate and personal estate, but a devise of real estate and a bequest of the residue of personal estate, the effect of that is that the rule in *Greville* v. *Browne* (1) still applies, and the legacies are payable only out of the personalty as given by the will to the named persons.

Declaration that pecuniary legacies payable only out of personalty. Costs as between solicitor and client out of estate.

Solicitors: *Robbins, Olivey & Lake*, agents for *Boase & Bennetts*, Penzance (for the plaintiff and for the first, second, fifth and sixth defendants); *Burton, Yeates & Hart*, agents for *Vivian Thomas & Son*, Penzance (for the third and fourth defendants).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

BENSON *v.* BENSON (BY HER GUARDIAN).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), **May 13, 14, 1941.**]

Divorce—Incurable unsoundness of mind—Period of care and treatment—Detention under order followed by treatment as voluntary patient—Mental Treatment Act, 1930 (*c.* 23), *s.* 5—*Matrimonial Causes Act*, 1937 (*c.* 57), *s.* 3.

A wife was detained under a direction by the Board of Control in a mental hospital under the provisions of the Mental Treatment Act, 1930, s. 5. Immediately following such detention she was admitted to another mental hospital as a voluntary patient, where she remained for the statutory period:—

HELD: the detention under the Mental Treatment Act, 1930, s. 5, amounted to detention under an order within the meaning of the Matrimonial Causes Act, 1937, s. 3, and a decree could be granted.

[**EDITORIAL NOTE.** The Matrimonial Causes Act, 1937, requires for the purposes of divorce that a person shall have been continuously under care and treatment for a period of at least 5 years. A person is deemed to be under care and treatment while he is receiving treatment as a voluntary patient, provided that the period of such detention follows immediately after detention under an order. Normally a person of unsound mind is detained under a reception order, but the Mental Treatment Act, 1930, s. 5, provided for detention without a reception order. In the present case, the detention under that section was continued under a direction by the Board of Control and it is held that the direction is an order within the meaning of the Matrimonial Causes Act, 1937, s. 3. As is well known, much of the recent legislation with reference to persons of unsound mind is directed to the removal of terms which had obtained, or were thought to have obtained, a derogatory significance and generally to alleviate the position of persons overtaken by this misfortune, and the real question here is whether the different terms used are sufficient to take the case out of the section.

AS TO DIVORCE ON GROUND OF INSANITY, see HALSBURY, Supp., Divorce, para. 981; and FOR CASES, see DIGEST, Supp., Husband and Wife, Nos. 3015a-3015e.]

Case referred to:

(1) *Gebhardt* v. *Saunders*, [1892] 2 Q.B. 452; 36 Digest 231, *716*; 67 L.T. 684.

Husband's Petition for dissolution of marriage on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for 5 years and upwards immediately preceding the presentation of the petition. The facts are fully set out in the judgment. A

P. R. Hollins for the petitioner.

E. Holroyd Pearce for the guardian *ad litem.*

Lord Merriman, P.: This is a husband's petition for divorce on the ground of the incurable insanity of his wife. The petition, dated B Aug. 13, 1940, alleges, as it is bound to do, that the respondent was continuously under care and treatment for a period of at least 5 years immediately preceding the presentation of the petition. The conditions necessary to satisfy the requirements of continuous care and treatment are laid down in the Matrimonial Causes Act, 1937, s. 3, in terms which C are imperative and exclusive.

The respondent wife is at the present time a voluntary patient in the county mental hospital at Lancaster, where she has been as a voluntary patient during the whole of the relevant period of 5 years—namely, from May 30, 1934. It is necessary, therefore, to look at that part D of sect. 3 which authorises the inclusion of voluntary patients in the category of those who have been receiving care and treatment for the statutory period.

Sect. 3 (*b*) provides that, for the purposes of sect. 176 of the principal Act, as amended by the Matrimonial Causes Act, 1937, a person of E unsound mind shall be deemed to be under care and treatment:

> . . . while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, being treatment which follows without any interval a period of such detention as aforesaid; and not otherwise.

That phrase "a period of such detention as aforesaid" picks up the provisions of para. (*a*), the relevant words of which are as follows: F

> . . . while he is detained in pursuance of any order . . . under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . .

In other words, unless there has been a detention under para. (*a*) immediately preceding the reception of treatment as a voluntary patient within the meaning of para. (*b*), treatment as a voluntary patient does G not satisfy the statutory definition. If treatment as a voluntary patient is so preceded, it does not matter in the least, of course, whether the period of treatment as a voluntary patient is long or short, or whether it occupies the whole, or merely part, of the necessary 5 years. The thing which is absolutely necessary is that it shall be preceded by a H period of detention in pursuance of an order under the Lunacy and Mental Treatment Acts, 1890 to 1930. As I have already said, this wife has, in fact, been a voluntary patient since May 30, 1934. On the day on which she was admitted to the county mental hospital at Lancaster, she was discharged relieved from the Cheshire county mental hospital at Chester, where she had been received on Sept. 29, 1933, for temporary treatment under the provisions of the Mental Treatment Act, 1930, s. 5. The question is, therefore, whether the circumstances in which she was so treated satisfy the condition that, during the period between Sept., 1933, and the transfer to Lancaster in May, 1934, which followed continuously upon that period, she was being detained in pursuance of an order under the Lunacy and Mental Treatment Acts, 1890 to 1930.

I shall have to look a little more closely at some of the provisions of the Mental Treatment Act, 1930, but I can begin by saying that it is admitted that during that period she was "detained" within the meaning of the Matrimonial Causes Act, 1937. It seems to me to be quite clear from the frequent use of the word "detained" in several of the subsections of sect. 5 of the Act of 1930 that reception for the purposes of temporary treatment under that section carries the element of detention. The real question in this case is whether that detention is under an "order."

Before examining the relevant sections of the Act of 1930 I must add one further fact. This wife was received into the county mental hospital at Chester, as I have already said, at the end of Sept., 1933, on recommendations which fulfilled the conditions of the statute; but on Feb. 26, 1934, application was made to the Board of Control for an extension of her treatment in that hospital under the provisions of sect. 5, and on Mar. 1, 1934, the secretary of the Board of Control issued a direction to the medical superintendent of the county mental hospital at Chester in the following terms:

> The Board of Control having considered the application of the husband and the recommendation of the acting medical superintendent of the county mental hospital, Upton, Chester, hereby direct in pursuance of the Mental Treatment Act, 1930, s. 5 (13), that the period of temporary treatment of Mrs. Florence Emily Benson be extended for a period not exceeding 3 calendar months from Mar. 25, 1934.

It follows, therefore, that, when she left the county hospital at Chester on or about May 30, and proceeded, without any interruption, direct to the county mental hospital at Lancaster, she left a treatment at Chester which was regulated, and, as I shall show in a moment or two, could only have been regulated, by the direction prolonging her treatment for the period between Mar. 25 and May 30, when she left Chester. It may be that this is the decisive matter for consideration in this case.

I turn now to the provisions of the Act of 1930. First, however, I wish to make one observation on the words I have already quoted from the Matrimonial Causes Act, 1937, s. 3 (*a*). As is common knowledge, the great majority of cases with which one has to deal under this particular jurisdiction are cases of detention in pursuance of a reception order under the Lunacy Act, 1890, but the material words are not so limited. If it had been intended to confine detention under sect. 3 (*a*) —I am deliberately ignoring detention under the Army Act and the rest of it—to cases where there had been a reception order under the Lunacy Act, it would have been perfectly simple to say so. Parliament has not said so, but has used the words "any order under the Lunacy and

Mental Treatment Acts, 1890 to 1930." I am not overlooking the argument of counsel for the Official Solicitor as guardian *ad litem*, nor am I overlooking the point that those words may be no more than a picking up of the wording of the Mental Treatment Act, 1930, s. 22 (1), which provides that the Act :

> . . . may be cited as the Mental Treatment Act, 1930, and shall be construed as one with the principal Act [the Lunacy Act, 1890] ; and the Lunacy Acts, 1890 to 1922, and this Act, may be cited together as the Lunacy and Mental Treatment Acts, 1890 to 1930.

That section, however, does not say that none of these Acts may be cited separately. It says merely that they may be cited together, and that is what is done, and I assume that Parliament meant to include a reference to an order under the Mental Treatment Act, 1930, itself. It is conceded by counsel for the guardian *ad litem* that, unless what has happened here amounts to an order under the Mental Treatment Act, 1930, there is nothing in the Act which would satisfy those words, and I think that I ought to see if, without doing violence to the English language, there is not something here which satisfies the words which Parliament has deliberately thought fit to include.

Speaking in the most general terms about the Mental Treatment Act, 1930, I think that it may be said that the scheme or object of the Act is to avoid all semblance of compulsion, and to encourage people to take early steps towards cure of mental disease, by the avoidance under this scheme either of the stigma of certification or of any appearance of compulsion. Nevertheless, I think it may fairly be said that under the euphemisms enjoined by sect. 20 (5) there is the iron hand of compulsion, however effectively it may be concealed by the velvet glove. Let us look, first, at the provisions with regard to the reception of voluntary patients contained in the first group of sections, of which the most important are sects. 1 and 2. Without going into unnecessary detail, the effect of sect. 1 is to substitute the volition of the patient for an order made by some authority, and to substitute the recommendation of a doctor for a certification, and it is assumed that the patient has at least sufficient mental capacity to express willingness to undergo treatment. This status of the voluntary patient may precede, succeed, or alternate with, some form of compulsion, either under the Lunacy Act, 1890, itself or under the later part of the Mental Treatment Act, 1930, to which I am about to refer. The capacity to volunteer is, as I have already said, assumed, and, having regard to the provisions of sect. 2 (3), the treatment as a voluntary patient ought to be replaced by some form of compulsion as soon as the hypothesis of volition ceases to have any reality. Sect. 2 (3) provides as follows :

> If any person received as aforesaid becomes at any time incapable of expressing himself as willing or unwilling to continue to receive treatment, he shall not thereafter be retained as a voluntary patient for a longer period than 28 days, and shall, if he has not been previously discharged, be discharged on the expiration of 28 days from the date on which he became incapable of so expressing himself, unless in the meantime he has again become capable of so expressing himself, or steps have been taken to

> deal with him either under the principal Act [the Lunacy Act, 1890] as a person of unsound mind or under sect. 5 of this Act as a person who is likely to benefit by temporary treatment.

I have referred to that aspect of the matter because, as I have already said, this particular patient has been assumed to retain that element of volition during the whole period since May, 1934, though I am bound to say that the affidavit evidence, by which I am completely satisfied as to her incurable unsoundness of mind, leads me to doubt whether, at any rate very recently, she can possibly have been capable of exercising the requisite volition. However, I am not concerned with that. It is sufficient to say that it is unquestionably true that she is incurably of unsound mind. It is unquestionably the fact that she has been in Lancaster as a voluntary patient during the requisite period, and I return to the question whether the period of treatment which preceded it was under an " order " within the meaning of the Act. That brings me to the Mental Treatment Act, 1930, s. 5, which provides as follows :

> . . . a person who is suffering from mental illness and is likely to benefit by temporary treatment but is for the time being incapable of expressing himself as willing or unwilling to receive such treatment may, on a written application duly made in accordance with the provisions of this section but without a reception order be received as a temporary patient for the purpose of treatment [into one of the institutions mentioned in the section, of which the Lancaster Mental Hospital is one].

The important words there are " but without a reception order." Subsects. (2), (3) and (4) deal with the form of recommendation to be made, and subsect. (5) limits to a very short period the effect of this recommendation, unless it is acted upon. Subsect. (6), which is very important, provides as follows :

> Where a person is received as a temporary patient under this section, notice of his reception, together with [other documents] . . . shall . . . be sent . . . to the Board of Control . . . The Board of Control shall upon the signed request of any person who considers himself to be unjustly detained under such application or recommendation furnish to him or to his authorised representative free of cost a copy of such application or recommendation.

It is clear so far, therefore, that nothing like a reception order is made. Indeed, the idea of a reception order is expressly excluded. The reception for treatment is brought about by a medical recommendation, to be followed immediately by notice to the Board of Control. It is important to notice, however, that there is a very strict limit upon the length of the detention. This is regulated by sect. 5 (11), which provides as follows :

> Subject to the provisions of this section a person received as a temporary patient may be detained for a period not exceeding 6 months but shall not be detained as such for any longer period.

The reference to " the provisions of this section " for the purposes of this case is to subsect. (13), which provides as follows :

> Where it is anticipated that a person who is undergoing treatment as a temporary patient under this section will not recover within the period of 6 months, but his early recovery appears reasonably probable, that period may from time to time be extended for further periods of such length not exceeding 3 months as may be specified in directions given by the Board of Control upon the application of one of the persons mentioned in subsect. (2) of this section, made in such form and accompanied by such evidence or recommendations as the Board may by rules made under sect. 338 of the principal Act [the Lunacy Act, 1890] prescribe, provided that such further periods shall in no case exceed 6 months in all.

It is quite plain—indeed, it is so expressed—that the extension of 3 months, in the course of which the change-over was made from Chester to Lancaster, was governed by the power under this subsection. In other words, the patient continued in Chester hospital between Mar. 24, 1934, and May 30, 1934, by virtue of the direction given by the Board of Control.

I think it is unnecessary to refer to any other subsection except subsect. (14). There must, of course, be some provision for what is to happen after the last possible extension has been exhausted, and subsect. (14) provides as follows:

> The Board of Control may at any time order (i) that any person received as a temporary patient shall be discharged; or (ii) that steps shall be taken to deal with him under the principal Act [the Lunacy Act, 1890] as a person of unsound mind.

It will be observed that the phraseology used there—namely, " that steps shall be taken "—is the same as that in sect. 2 (3), but, of course, the steps which can be taken, when the person has already been dealt with under sect. 5, as an alternative to immediate discharge can be only those to be taken under the principal Act. *Ex hypothesi*, the powers under this Act are already exhausted.

Counsel for the guardian *ad litem* rightly says that the word " order " occurs in no relevant part of this Act except subsect. (14), and it is quite clear that no order of that sort has been issued. I am bound to say that I see very clearly the difficulty, which counsel for the guardian *ad litem* has put to me, involved in saying that a voluntary patient is being treated, speaking generally, under any order, in face of the explicit words that the power to receive a patient for such treatment is to be without a reception order. However, for reasons which I am about to give, I do not think that I am called upon in this case to decide that general question, and, as anything which I have to say about it, in the view I take of this case, would be *obiter*, I propose to reserve any final expression of opinion on the matter until the point calls for direct decision. However, I think that it is worth calling attention to the fact that in a group of cases decided under the Public Health (London) Act, 1891, of which *Gebhardt* v. *Saunders* (1) is an example, it did not appear to shock the mind of the judges who decided that case and cases which followed it to hold that the word " order " might be taken to include " notice." Whether or not this would be sufficient I am not pretending to decide, but it is worth recalling that one of the essential steps in the case of a voluntary patient is that notice of the application and the recommendation shall be sent to the Board of Control, who from that moment have to bear responsibilities in the matter, to some of which I have already alluded. However, I am not proposing to decide that matter now, because I am not deciding a case which depends merely on the original reception for treatment under sect. 5. I am deciding a case where the statutory maximum period of such treatment was extended, in accordance with the statute, by direction of the Board of Control, and I find it quite impossible to say that, from the date when the original period expired and the patient was detained under the direction I have quoted, she was not detained by an order.

Counsel for the petitioner has directed my attention to the OXFORD ENGLISH DICTIONARY, from which it is quite clear, as I should myself have supposed, that in certain contexts "order" and "direction" are interchangeable terms. A "direction" is said to be "an order to be carried out," and "order," for example, so far as the Supreme Court is concerned, is said to be "a direction other than final judgment," and I should find it very difficult indeed, for the purposes of this Act, to draw any sensible distinction between a direction of the Board of Control that the statutory maximum period should be enlarged and an order to the same effect. I think, therefore, that—at least from the moment when this direction came into effect—the wife in this case was detained in pursuance of an order under the Mental Treatment Act, 1930. That period of detention immediately preceded her treatment as a voluntary patient at Lancaster, and, therefore, the statutory conditions laid down in the Matrimonial Causes Act, 1937, s. 3, are complied with. That being so, the husband is entitled to a decree.

Decree nisi granted.

Solicitors: *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the petitioner); *Official Solicitor* (for the guardian *ad litem*).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

In the Estate of FAWCETT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **May 14, 1941.**]

Probate—Motion to admit later of two wills to probate—Revocation of former will by later—Powers of construction of Probate Division.

A testatrix left two testamentary documents. The earlier one was in proper legal form and the later one was a holograph will made without legal advice, and did not expressly revoke the earlier will:—

HELD: the court has power to decide questions of construction in so far as they affect the admissibility to probate of a testamentary document. In this case, the second will was intended to revoke the earlier one and should alone be admitted to probate.

[**EDITORIAL NOTE.** As a general rule questions of construction are for the Chancery Division. Where, however, a point of construction has to be determined before it can be decided whether a document ought to be admitted to probate, the probate court can itself deal with the point and it is not necessary that separate proceedings should be brought in the Chancery Division.

As to What May Be Admitted to Probate, see HALSBURY, Hailsham Edn., Vol. 14, pp. 192-194, para. 316; and for Cases, see DIGEST, Vol. 23, pp. 93-95, Nos. 863-878.]

Cases referred to:

(1) *Re Hawksley's Settlements, Black* v. *Tidy*, [1934] Ch. 384; Digest Supp.; 103 L.J.Ch. 259; 151 L.T. 299.

(2) *Dempsey* v. *Lawson* (1877), 2 P.D. 98; 44 Digest 322, *1544*; 46 L.J.P. 23; 36 L.T. 515.

(3) *In the Estate of Bryan*, [1907] P. 125; 44 Digest 334, *1647*; 76 L.J.P. 30; 96 L.T. 584.

(4) *In the Goods of Petchell* (1874), L.R. 3 P. & D. 153; 44 Digest 332, *1622*; 43 L.J.P. & M. 22; *sub nom. In the Goods of Petchell*, 30 L.T. 74.

(5) *Plenty* v. *West & Budd* (1845), 1 Rob. Eccl. 264; 44 Digest 330, *1611*; 4 Notes of Cases 103.

Motion to admit to probate the later of two wills or both of them. The facts are fully set out in the judgment.

W. Latey for the executors, Barclays Bank, Ltd.

I. J. Lindner for the residuary legatees under the earlier will.

W. Jackson Wolfe for the residuary legatee under the later will.

Langton, J.: This is a motion to admit to probate both or the later of two wills. The testatrix, a married woman, died on Oct. 25, 1940, leaving no children. She left a will, dated June 16, 1931, in which she named as executors Barclays Bank and her sister Mrs. Elizabeth Jane Williams. Under that will, which was drawn in due form with professional assistance, she left as residuary legatees her nieces Margaret and Sarah Holt. In addition, there was a codicil, dated Feb. 12, 1932, but that codicil, I think, only dealt with the exercise of a power which, as a matter of fact, the testatrix could not exercise, as she was not the survivor under her father's will. In addition to these two testamentary documents, drawn in due and proper form, she left a holograph document, written in pencil, and dated Jan. 14, 1940, in which she named no executors expressly. The instrument was duly executed, signed and attested, and no attack is made upon it as a testamentary document, but it has been argued that it does not express any clear intention to revoke the earlier will, and counsel for the residuary legatees under the earlier will has come here to argue that both documents should be admitted to probate.

Two points have arisen. The first point is as to my jurisdiction to deal with this question, which involves considering the terms of the later document of Jan. 14, 1940, and it is said that I have no jurisdiction to deal with a question of construction. The estate in question is a very small one, and there is no doubt that it would be a hardship to some of the parties concerned if they had to go from this court without any ruling upon the point which is raised here and have the matter debated in Chancery. Where the question of construction is limited entirely to the point as to which of the testamentary documents should be admitted to probate, it does not seem to me that this court ought to refuse a decision. It is not a question of my right to decide it. It is a question of my duty, and I think that I ought to decide it, and not put the parties to the further expense of proceedings in Chancery. Any other question of construction, or any other interpretation of the documents, whenever it arises, is, as Luxmoore, J., pointed out in *Re Hawksley's Settlements, Black* v. *Tidy* (1), a matter for the Court of Chancery.

I am assuming the function of construction only for the simple purpose of deciding which of the documents before me should be admitted to probate, and I find abundant authority for that action, as it seems to me, in the decision of Sir James Hannen, P., in *Dempsey* v. *Lawson* (2), which is cited with clear approval by Lord Gorell, P., in *In the Estate of Bryan* (3). Since *In the Estate of Bryan* (3) also deals with other matters germane to the present case, I will take the whole passage from the judgment of Lord Gorell, P., at p. 129 :

> Then coming to decided cases, *Dempsey* v. *Lawson* (2) is an authority for saying that the fact that a later will does not dispose of the whole property of the deceased, and contains no express clause of revocation, will not necessarily prevent it from being treated as revocatory of an earlier document which did dispose of the whole property. Sir James Hannen, P., said [p. 105] : " In support of this contention, Williams on Executors, 6th Edn., p. 150, and the cases there cited, were relied on. I assent to the principle expressed in the passage referred to, and I have had occasion to act upon it in the case of *In the Goods of Petchell* (4), but it becomes necessary on the present occasion to consider more minutely the nature and extent of the inconsistency of a later testamentary instrument, which will have the effect of revoking an earlier will. In this investigation the court is necessarily called upon to put a construction upon the language of the instrument in question ".

That passage seems to me to make it quite clear that this court is not entitled to shirk the question of construction where it is limited to the point—which is for this court to decide—as to which of two documents is to be admitted to probate. Sir James Hannen, P., continues as follows in *Dempsey* v. *Lawson* (2), at p. 105 :

> The intention of the testator conveyed in that language has to be ascertained by reference to the facts in connection with which it was used ; but in seeking for the true meaning of the testator, the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later will does not completely cover the whole subject-matter of the earlier. This is what was decided in *Plenty* v. *West and Budd* (5).

Thus we have a chain of authority there from Sir James Hannen, P., on the direct point that the court is not to shirk the question of construction, and we have Lord Gorell, P., accepting what had been said by the earlier presidents in this court. The passage I have quoted, moreover, is important, not only because it is a warrant for my action in dealing with the question of construction, but also because it gives a very clear direction as to how that matter of construction shall be viewed, and, following that line, I will consider in detail this later document of Jan. 14, 1940. The first significant words are at the beginning of the document :

> I am feeling very ill at times these days and have meant to alter or make a fresh will as the one I made 8 years ago was a measure just for the time and conditions have greatly altered and I may not have the time to do as I would wish.

I read those introductory words as meaning that the testatrix desired to make a fresh will, and that, in so far as in her lay, at that moment she was making a fresh will, but that she had doubts in her own mind as to whether a will drawn as she was drawing it then, without any legal assistance—and, as she probably thought, without the magic of legal language—would prove to be effective. Fortunately, as we know, there is no magic in any legal language as regards wills. So long as the document is unambiguous in its terms and is properly executed, properly attested, and properly signed, there is no magic in any particular language to effect the testator's desires.

It has been argued by counsel for the residuary legatees under the earlier will that the first word there is "alter," and that it is possible to take this earlier will of 1931 and the codicil and to construe them with the later will, and in that way make sense. Personally, I am not at all impressed by any suggestion as to how those two documents could be joined together, but, apart from that, I do not think that that is what the testatrix meant. I think that, when we take all the words, "I . . . have meant to alter or make a fresh will as the one I made 8 years ago was a measure just for the time and conditions have greatly altered," it is clear beyond any reasonable doubt that the testatrix was endeavouring to change and revoke the whole of her first will, to revoke it completely, and not merely to alter parts of it.

The second line of argument which has been put forward by counsel for the residuary legatees under the earlier will is that it is not clear that in this second will the testatrix meant to dispose of all her property, and that there is obscurity as regards the executorship. However, taking the second of these points first, I think that the experience of anyone who has sat in these courts for any time is that there is practically nothing of which lay people are so uninformed as the duties and functions of an executor. When they make wills on their own account, without legal assistance and without the assistance of a stationer's copy, it is my experience that the thing they are most likely to forget is that invaluable person, the executor. It never seems to occur to them that, when once they have written down their wishes on a piece of paper, it would be a good thing to appoint someone to carry them out. As to the origin of this human imperfection, I do not intend to inquire, but it is a fact which I have observed, and which I think a great many people before me have observed. Therefore, I am not greatly impressed by the failure of the testatrix to nominate an executor.

Then the argument went on to say that the testatrix does name Barclays Bank as people who could do something in the way of selling her property and realising her assets, and that, if one goes back to the earlier will, Barclays Bank are named as executors, and so, to that extent, she meant to keep alive the earlier document. I am bound to say, however, that, when one turns to the earlier document, one finds not only Barclays Bank, but also Mrs. Elizabeth Jane Williams, who was the sister of the testatrix, and who survived her, named as an executor. The sister is not even referred to in the second document, and, therefore, I think that there is really nothing in the point about continuing the executors.

Then comes the argument on the subject of the disposal of the property of the testatrix, who has used rather inapt language :

> All else to be sold and the proceeds after the debts etc. Barclays Bank will do this to Emily Thompson and any money I may have in the bank.

I do not think that counsel for the residuary legatees under the earlier will was concerned to argue that that means anything different from the fact that everything the testatrix has after the payment of debts, etc., is to be sold by Barclays Bank, and the proceeds, together with any money in the bank, are to go to Emily Thompson. However, it is rather obscurely expressed, and no doubt in a court of construction there might be a great difficulty in suggesting that the use of the phrase "all else," with the subsequent mention of "any money," disposed of the whole estate. Let me say at once that I have no ambition at all to arrogate to myself the functions of a court of construction and to say what the words mean. I can only say that, in so far as this passage may provide evidence of the desire of the testatrix to dispose of the whole of her estate, whether or not she has succeeded in doing it, I think that it is good evidence that she meant so to do. A court of construction may well say that she has not succeeded, but I am concerned with her intention only. This is a passage which concerns me merely in so far as it reflects upon the desire of the testatrix to revoke the earlier will. I think that it is confirmatory evidence of a desire to revoke the earlier will, whether or not it is successful in its object. That really disposes of the whole matter. I think I have jurisdiction to deal with this subject, and, in my view, there is no advantage to be gained in sending it to be tried elsewhere. In my judgment, it is very clear that the testatrix intended to revoke her earlier testamentary disposition, both the will and the codicil. For this reason, the second disposition, dated Jan. 14, 1940, will alone be admitted to probate as indicating her testamentary disposition.

Another matter which was raised on this motion was whether, in the second document, Barclays Bank were executors, according to the tenor. I have heard argument about that and I have come to the conclusion that they are. I think that the reference to them by the testatrix in this unprofessional language—namely, "Barclays Bank will do this"—meant that she thought that they would act as her executors, as, indeed, she had named them as joint-executors in her earlier will. Therefore, in so far as it is necessary to decide that point, I decide also that Barclays Bank are executors according to the tenor of the will.

Order that the second disposition, dated Jan. 14, 1940, *be alone admitted to probate. Barclays Bank undertaking to make a formal renunciation of probate, letters of administration with the will annexed granted to Emily*

Thompson under the Supreme Court of Judicature (Consolidation) Act, 1925, *s.* 162. *Costs of all parties out of the estate.*

Solicitors: *Langham & Letts* (for Barclays Bank); *Waterhouse & Co.* Agents for *Bickley & Lynex*, Birmingham (for the residuary legatees under the earlier will); *Herbert L. Dean & Co.* (for the residuary legatee under the later will).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

SYED OMAR BIN SHAIKH ALKAFF *v.* SYED ABDULRAHMAN BIN SHAIKH ALKAFF AND OTHERS.

[Privy Council (Lord Atkin, Lord Thankerton, Lord Romer, and Clauson and Luxmoore L.JJ.) **February 18, 19, 20, April 3, 1941.**]

Privy Council—Straits Settlements—Settlements—Family settlement—Construction—Permanent improvements charged to income or corpus—Trustees' power to recoup income out of corpus—Accumulations Act, 1800.

By a settlement, dated Oct. 8, 1901, the settlor conveyed to certain trustees certain house property in Singapore upon trust at the expiration of 21 years from the death of the survivor of 20 persons named, or at the time when all the male line of the settlor or his deceased brother being dead the youngest child of such male children who should live to attain the age of 21 years should attain that age, whichever event should first take place, for such persons then living as were male grandchildren of the settlor or his deceased brother as tenants in common in equal shares, with various provisions to meet the case of a failure of male issue of the settlor or his deceased brother. The settlor then proceeded to deal with the annual rents and profits which would accrue before the class of person to be beneficial owners of the property was ascertained. From the terms of the settlement, it can be inferred that the testator desired that the corpus of the trust property should not be diminished by sale or mortgage in order to provide funds to discharge the various expenses which the trust might have to incur, and that those expenses should be met out of the gross rents and profits of the trust estate before the amount of the income to be divided among the beneficiaries was arrived at. Some of these expenses thus to be borne by income were expenses which, in the absence of such special provisions as appeared in the settlement, would, in the normal case of administration of a corpus of property held in trust for tenant for life and remainderman, fall on capital, and not on income. The settlor died on Mar. 31, 1910, and, although several of the persons named in the settlement have died, the trusts for the ultimate beneficiaries are not likely to vest for a considerable time, and the income in the meantime is divisible among a considerable number of persons. The court was asked to decide (i) whether, upon the true construction of the settlement, and having due regard to the rights of the parties interested thereunder, the costs of rebuilding, sanitary installations and/or permanent improvements to the settled property should be charged to income or corpus, (ii) in the event of it being declared that, upon the true construction of the settlement, the cost of any such rebuilding, sanitary installations and/or permanent improvements should be charged to income, up to what date, having regard to the provisions of the Accumulations Act, 1800, such items should continue to be debited to income, and (iii) whether the trustees of the settlement can recoup income out of corpus to the extent of all or any part of the expenditure which has been incurred upon the items set out in the schedule :—

HELD : (i) upon the true construction of the settlement, the whole of the expenditure specified in the schedule should be charged to income exclusively.

(ii) the provisions of the Accumulations Act, 1800, do not operate to preclude the payment of that expenditure out of income.

(iii) the trustees of the settlement are not entitled to recoup income out of corpus in respect of the specified expenditure.

[**EDITORIAL NOTE**. The settlement in this case is not only in an unusual form, but, as to most of the matters here considered, contains special powers in place of the usual statutory powers. The matter is, therefore, largely one of the construction of this particular document, but, on the question of the incidence of the cost of improvements, it deals with a matter which was often before the courts in England some few years ago. When the modernisation or repair of property is forced upon owners by local authorities in the exercise of their statutory powers, it would seem inequitable that the cost should fall upon those entitled only to the income. If the cost is placed upon capital, it has to be borne in some measure by all beneficiaries and, in such a case, this seems the only fair course to adopt. However, having regard to the decision herein, it seems that, by the use of suitable clauses, even these expenses can be made payable out of income.

AS TO INCIDENCE OF OUTGOINGS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 657-660, para. 941 ; and FOR CASES, see DIGEST, Vol. 40, pp. 681-685, Nos. 2172-2207.]

Cases referred to :

(1) *Aldridge* v. *Ferne* (1886), 17 Q.B.D. 212 ; 31 Digest 304, *4478* ; 55 L.J.Q.B. 587.

(2) *Stockdale* v. *Ascherberg*, [1904] 1 K.B. 447 ; 31 Digest 305, *4489* ; 73 L.J.K.B. 206 ; 90 L.T. 111 ; *affg.*, [1903] 1 K.B. 873.

(3) *Lowther* v. *Clifford*, [1927] 1 K.B. 130 ; Digest Supp. ; 95 L.J.K.B. 576 ; 135 L.T. 200.

APPEAL by the person appointed to represent all tenants for life entitled under the settlement from an order of the Court of Appeal of the Straits Settlements, dated Apr. 29, 1939. The facts are fully set out in the judgment of their Lordships delivered by CLAUSON, L.J.

C. R. R. Romer, K.C., and *Wilfrid M. Hunt* for the appellant.

C. E. Harman, K.C., and *R. Withers Payne* for the first respondent.

A. C. Nesbitt (for *P. J. Sykes* on war service) for the other respondents.

CLAUSON, L.J.: This is an appeal from an order of the Court of Appeal of the Straits settlements, dated Apr. 29, 1939, dismissing an appeal from an order of the High Court of the Straits Settlements dated Feb. 23, 1939, which made certain declarations with respect to matters relating to the execution of the trusts of a settlement, dated Oct. 8, 1901. This settlement, which exhibits features which differentiate it very materially from the forms of family settlement commonly adopted in England, may be summarised as follows. The settlor conveys to certain trustees (all of whom are male descendants in the male line of the settlor or his deceased brother) certain house property in Singapore particularised in the first schedule, upon trust at the expiration of 21 years from the death of the survivor of 20 persons named in the second schedule (being the settlor himself and 19 persons who are male descendants in the male line of the settlor or his deceased brother), or at the time when, all the A male children of the settlor or his deceased brother being dead, the youngest child of such male children who shall live to attain the age of 21 years shall attain that age, whichever event shall first take place, for such persons then living as are male grandchildren of the settlor or his deceased brother as tenants in common in equal shares, with B various provisions (immaterial for the present purpose) to meet the case of a failure of male issue of the settlor or his deceased brother. The settlor then proceeds to deal with the annual rents and profits which will accrue before the class of persons to be beneficial owners of the property is ascertained : C

> The trustees shall in the meantime until the said trust premises shall have become vested under the trust last hereinbefore declared stand possessed of the net annual rents and profits thereof which shall remain after payment of the expenses of the maintenance upkeep and repair of the buildings in the trust premises and all expenses of and incidental to the management and improvement of the trust premises and the execution of the trusts of these presents upon trust to divide the same annually among such of the male children or remoter male issue of the settlor and his deceased brother as shall from time to time be living during their respective D lives in equal proportions but so that the issue of a deceased child shall take among them the share only which their parent or parents would have taken if living.

There follow provisions enabling the application of a minor's share of income for his maintenance and benefit and for the accumulation of any surplus interest for the minor if he attains 21 years, and directing that, E in case of his death under that age, the fund so accumulated is to be held upon the trusts of the settlement. Next follows a clause providing as follows :

> The trustees in the meantime and until the vesting of the trust property in the ultimate beneficiaries shall have power to manage the trust premises and to make allowances to and arrangements with tenants and others and to accept surrenders F of leases and tenancies and to demise all or any part of the trust premises for any term of years not exceeding 5 years at the best rent to be reasonably obtained without taking a fine or premium and subject to such special covenants and provisions as may be deemed proper and out of the gross annual rents and profits received shall after paying to the acting trustees or trustee in Singapore a commission at the rate of 2½ per cent. on the gross profits and after paying all rates taxes and outgoings payable in respect of the trust premises and other expenses of maintenance upkeep and repair and all expenses of and incidental to the management and G improvement of the trust premises and the execution of the trust of these presents make the various annual payments and deductions set forth in the third schedule hereto [being payments of comparatively trifling amounts of a charitable character].

Next follow provisions preventing the alienation of any shares of income taken under the settlement. There is a provision that new trustees are to be selected from the male children and male issue of the settlor H or his deceased brother, and the only remaining provision of the settlement to which it is necessary to refer is the last clause, which is as follows :

> And it is hereby expressly agreed and declared that these presents shall not be deemed to confer upon the said trustees or trustee any power either express or implied to sell mortgage alienate or otherwise charge the said trust premises and that the said trustees or trustee shall not insure the same against fire any statutory or other power to the contrary notwithstanding.

It appears clearly from the terms of the settlement that the testator desires that the corpus of the trust property shall not be diminished by sale or mortgage in order to provide funds to discharge the various expenses which the trust may have to incur, but that those expenses are to be met out of the gross rents and profits of the trust estate before the amount is arrived at of the income to be divided among the beneficiaries. Further, it is clear that some at least of these expenses thus to be borne by income are expenses which, in the absence of such special provisions as appear in the present settlement, would, in the normal case of the administration of a corpus of property held in trust for tenant for life and remaindermen, fall on capital and not on income. As an example may be given the expense of appointing new trustees.

The settlor died on Mar. 31, 1910. It appears that, although several of the persons named in the second schedule to the settlement have died, the trusts for the ultimate beneficiaries are not likely to vest for a considerable time, and the income in the meantime is divisible among a considerable number of persons.

In 1926, the then trustees of the settlement had occasion to apply to the court for the purpose of obtaining an order, under certain statutory provisions corresponding generally to the Settled Estates Act, 1877, of the Imperial Parliament, to enable the trustees to sell part of the trust property notwithstanding that they had no power to sell it according to the terms of the settlement. By the same summons, the trustees asked to have it determined whether, upon the true construction of the settlement, the trustees were entitled to rebuild any of the premises belonging to the trust out of the income of the trust in the event of such rebuilding becoming necessary. It appears that a representation order was made in this proceeding appointing a representative of the adult beneficiaries and a representative of the infant beneficiaries, obviously in order to enable the court to make an order for sale which would bind all the beneficiaries. There does not appear to have been any argument placed before the court on behalf of those interested in income on the one hand and on behalf of those interested in capital on the other hand, since there were no separate representatives of the respective interests in income and capital, but nevertheless the court declared (in an order dated Sept. 18, 1926) that, on the true construction of the settlement, the trustees were entitled to rebuild any of the premises forming part of the settled estate out of the income thereof in the event of such rebuilding becoming necessary. Before and after the date of that order, the trustees incurred very substantial expenditure, the particulars of which appear in the schedule to the summons next mentioned, and by an originating summons dated July 28, 1938, the trustees initiated the proceedings the subject-matter of the present appeal, the trustees being plaintiffs and the appellant to His Majesty in Council being defendant. The relief asked, so far as it is material to the matters before their Lordships, was as follows:

(1) Whether upon the true construction of the settlement and having due regard to the rights of the parties interested thereunder the costs of rebuilding, sanitary installations and/or permanent improvements to the settled property should be charged to income or to corpus. (2) In the event of it being declared that upon the true construction of the settlement the cost of any such rebuilding, sanitary installations and/or permanent improvements should be charged to income, up to what date having regard to the provisions of the Accumulations Act, 1800, such items should continue to be debited to income. (3) Whether the trustees of the settlement may now recoup income out of corpus to the extent of all or any part of the expenditure that has been incurred upon the items set out in the schedule to this summons . . . (7) That for the purposes of this summons the defendant be appointed to represent all life tenants entitled under the settlement, and that Dr. C. H. Withers-Payne be appointed to represent all remaindermen entitled under the settlement.

In due course, an order was made that, for the purposes of the summons, the present appellant should be appointed to represent all life tenants entitled under the settlement, and that Dr. Withers-Payne, the last respondent before their Lordships' Board, be appointed to represent all remaindermen entitled under the settlement. The evidence filed consisted of an affidavit by one of the trustees and an affidavit by one Brewer, a local architect and surveyor. From the trustees' affidavit it appears that since 1922 the trustees had, when required by the municipal commissioners, from time to time installed sanitary appliances in houses subject to the trusts of the settlement and they had also partly rebuilt, and made permanent improvements to, some of the trust properties, and that they had expended money on architects' supervision fees, fees paid to the municipal commissioners upon the submission of plans in cases of rebuilding, and legal costs in connection with various questions arising out of the provisions of the municipal ordinance and other matters, and that the whole of the expenditure had so far been debited to income exclusively. The affidavit states the earlier proceedings in 1926 relating to the trust, and explains that three of the four trustees who are life tenants have complained about the effect on their income of debiting the cost of sanitary installations, rebuilding and other similar items against income alone, and that the trustees, on taking legal opinion in regard to these complaints, have only now discovered that items of the kind above referred to may in some cases be more properly chargeable against capital. The affidavit proceeds to state that the trustees have at their disposal certain funds representing capital arising from certain compensation paid by the Singapore Improvement Trust in respect of acquisitions made by them, but these funds would be unlikely to be sufficient for the purpose of recoupment, if recoupment is ordered. The affidavit of the architect and surveyor deals with the sums expended on the reconstruction of the three houses which have been reconstructed and expresses the view that in each case the value has been increased by at least the amount of the expenditure, and that the whole of the expenditure should be attributed to permanent improvement.

The originating summons came before PEDLOW, J., on Feb. 23, 1939. It was argued before him that the effect of the order made on the summons of 1926 that, upon the true construction of the settlement, the plaintiffs were entitled to rebuild any of the premises forming part of the settled estate out of income did not operate as *res judicata* in regard to the matter before him. His Lordship regarded that order as simply saying that, if rebuilding becomes necessary, the trustees can, if they wish, A rebuild out of income, and not as deciding that, if they rebuild at all, they must rebuild out of income. He proceeded to hold that the vital question was what was the intention of the settlor and what did he direct, and were his directions capable of being carried out, and his Lordship expressed the opinion and held that the settlor wished the trustees to B keep the capital intact and to pay out of income all expenses of maintenance, upkeep and repair of the trust premises, and all expenses of and incidental to the management and improvement and the execution of the trusts. In other words, he held that all expenditure whatsoever was to come out of income. His Lordship added:

> C I know of nothing which would make it unusual for an Asiatic settlor to take this attitude to his estate.

Then he referred to the clause refusing to confer on the trustees any power, either express or implied, to sell, mortgage, alienate or otherwise charge the trust premises as bearing out this view of the settlor's intentions. D As to cl. 2 of the summons, his Lordship held that the Accumulations Act, 1800, did not apply to the matter. His Lordship observed that it might have applied till the death of the settlor in 1910, but that the expenditure with which he was concerned all took place since that date, and since 1910 there had been no trust for accumulation, but a trust for E an annual distribution of income. His Lordship then expressed the view that it followed that there was to be no recoupment out of corpus.

Although the judgment of the judge as delivered appears to relate only to the items of expenditure dealt with in the evidence, his order as drawn up follows the first paragraph of the summons and declares in F general terms that, upon the true construction of the settlement, the whole cost of rebuilding, of sanitary installations and of permanent improvements to the settled property should be charged to income exclusively. The order goes on to declare that the provisions of the Accumulations Act, 1800, do not apply to the settlement so as to limit G the period during which the whole cost of rebuilding, sanitary installations and of permanent improvements is chargeable exclusively to income. It is then declared that the trustees are not entitled to recoup income out of corpus in respect of any of the expenditure incurred upon the items set forth in the schedule to the originating summons. The order H goes on to authorise by consent a sale to the municipal commissioners and the Singapore Investment Trust of any property subject to the trusts of the settlement required by either of those bodies for the purposes of the municipal ordinance or the Singapore Improvement ordinance. No question was raised on this part of the order, either on appeal to the Appeal Court or before their Lordships, and no further reference need be made to it. Their Lordships find some difficulty in ascertaining what arguments were placed before the judge in regard to the Accumulations Act, 1800, and they find a corresponding difficulty in ascertaining from the judge's judgment as delivered precisely what view he took as to the operation, if any, of that Act upon the terms of the settlement. It is clear, however, that he was satisfied that nothing in the Accumulations Act, 1800, rendered void the clause in the settlement dealing with the expenditure to be made by the trustees out of income.

The present appellant before their Lordships' Board, representing income, appealed against the order of PEDLOW, J., to the Court of Appeal of the Straits Settlements, and on Apr. 29, 1939, that court (consisting of the Chief Justice of the Straits Settlements (MCELWAINE, C.J.), the Chief Justice of the Federated Malay States (POYSER, C.J.), and TERRELL, J.) dismissed the appeal. MCELWAINE, C.J., took the view, differing in that regard from POYSER, C.J., that the order made on the summons of 1926, on its true construction, determined that the trustees were entitled to rebuild out of income and not out of corpus, and that the question raised in the present proceedings was in substance the same, and the decision in the present case must be the same, as in the former, and on that ground he was prepared to reject the appeal. However, he went on to express his own view as to the construction of the settlement. In his opinion, the final paragraph in the settlement refusing the trustees any power of alienation had the effect of forbidding the trustees to realise the corpus in order to pay for anything which they can or must do under the settlement, the settlor's intention being that his landed property should be retained and perhaps increased, but not diminished. On this ground, he held the orders made on the 1926 summons and the order of PEDLOW, J., under appeal to be right. POYSER, C.J., took the view that the order made in 1926 would not prevent the trustees from applying to the court in the future for permission to reconstruct other buildings or make other permanent improvements. His Lordship pointed out that circumstances might arise—*e.g.*, a fire destroying a large number of buildings—which would justify an order for debiting corpus with the cost of rebuilding. In his Lordship's opinion, it was not now open to the tenants for life to ask that permanent improvements already made and authorised by the court to be paid for out of income should now be paid for out of corpus. However, he found it unnecessary specifically to decide the point, for he was prepared to hold that the judge was right in holding that none of the items referred to in the summons should be charged to corpus on the ground that the settlor's intentions were clear that the cost of all improvements and rebuilding should be met out of income. His Lordship did not deal with the second question in the summons as to the Accumulations Act, 1800, as he understood it to be conceded that, as there was no trust for accumulation, the question did not arise. TERRELL, J., was also in favour of rejecting the appeal. He held that the decision on the 1926 summons decided that the trustees on the true construction of the settlement were entitled to rebuild out of income, but did not decide whether the trustees could rebuild out of corpus. His Lordship held, however, that, on the true construction of the settlement, the trustees have a definite duty to pay out of income such things as rates and taxes and the current expenses of maintenance and repairs. They also have a discretion to make more permanent improvements and rebuild, and, if they exercise such discretion, the expenses involved are also payable out of income. In his view, those representing income really wanted the court to say that the trustees' discretion was wrongly exercised, and he could see no ground whatever for so finding.

The present appellant, representing income, now appeals from the decision of the Court of Appeal, and in the first place questions the correctness of the view on the construction of the settlement—adopted by PEDLOW, J., and, as it would seem, approved by each of the judges of the Court of Appeal—that the settlor's intention is clearly shown by the very special and peculiar terms of the settlement to be that all expenses which the trustees are directed or empowered to make out of the trust funds are to be made by them out of income. It was admitted by the appellant that the payments referred to in the schedule to the summons were not made in breach of trust. No objection was made before their Lordships to the payment of the expenses out of income, save only the road-making expenses, items 6 and 7 in the schedule. It was urged that these expenses, though admittedly properly paid, were of such a character that they ought to be borne, in part, at all events, by the corpus of the property, on the ground that, if they remained unpaid, the municipal commissioners could, under the relative statutory provisions, recover them by way of enforcing a charge upon the portions of the trust properties fronting on the various roads. Their Lordships are ready to assume that that would be the case. They are satisfied, however, that the expressions used by the settlor are sufficient to make it clear that, even so, the expenses in question should be borne out of income. The settlor directs that all outgoings are to be paid out of income, and the word " outgoings," a word of wide meaning, as explained in such English decisions as *Aldridge* v. *Ferne* (1), *Stockdale* v. *Ascherberg* (2), and *Lowther* v. *Clifford* (3), is sufficient in itself, in their Lordships' view, to cover such expenditure as is in question. The addition, however, of the words " expenses of and incidental to the execution of the trusts of these premises " removes, in their Lordships' view, any possible doubt. The trustees cannot properly execute their trust unless they defray these expenses and thus protect the trust property from the commissioners' claim for the liquidation of these expenses, and expenses incurred in thus executing their trust are expressly directed to be paid out of income.

A further criticism upon the order made on behalf of the appellant was that the expenses appearing in cl. 9 in the schedule to the summons included a sum of $1,600 for the acquisition of further property to be added to the trust property. It was admitted—and, in their Lordships' view, rightly—that this purchase was perfectly proper as being merely incidental to the rebuilding of the property mentioned in the clause, and was not made in breach of trust. It was argued, however, that the approval of this expenditure might hereafter be used to justify an expenditure of income in purchasing property to be added to the trust corpus. Their Lordships are of opinion that the order should be framed in such a way as to indicate that it is the expenditure on this particular purchase which has been sanctioned by the court, such expenditure being in truth mere expenditure incidental to the rebuilding, and they accordingly think it desirable that the first declaration in the judgment of Pedlow, J., should be confined to the expenditure particularised in the schedule to the summons. This variation of the order has the advantage that it limits the declaration so as to accord with the judgment of Pedlow, J., as delivered, which is in terms limited, as regards the matter of the first declaration, to the items referred to in the schedule to the summons. This will also preclude any possibility of a future argument that the order affects the exercise by the court, should the appropriate circumstances exist in the future, of such power, if any, as the court may be found to have, under statute or otherwise, of overriding the settlor's intention that all expenses should fall on income.

It will be observed that this declaration in the order, varied to the extent above suggested, necessarily implies that, in their Lordships' judgment, the clauses in the settlement to which reference is made are not in any way made null and void by the Accumulations Act, 1800. Objection was taken to the form of the second declaration in the order of Pedlow, J., on the ground that the trustees might in the future exercise the power conferred on them in the settlement of expending income in such a manner as to occasion an infringement of the Accumulations Act, 1800. Whether the trustees could do any such thing without committing a breach of trust, and what operation the Act would have in the circumstances, are questions on which it is undesirable to make any pronouncement until the circumstances occur which give rise to them. It is not suggested that any of the expenditure particularised in the schedule to the summons was made in breach of trust, or results in fact in accumulation. Their Lordships do not regard the form of the second declaration in the judgment of Pedlow, J., as happily worded. They think that it would be better to confine the reference to the Accumulations Act, 1800, to a declaration to the effect that the provisions of the Accumulations Act, 1800, do not operate to preclude the payment out of income of the expenditure specified in the schedule to the summons. In the view that their Lordships take of the matter, there is—as, indeed, all the judges in the court below appear in substance to agree—no need to make any pronouncement on the question of how far the existence of the order made on the 1926 summons might have operated to preclude the court from making a declaration inconsistent with that order.

As regards the costs of the matter before Pedlow, J., no objection has

been, or, in their Lordships' view, properly can be made, to the terms of his Lordship's order relating to them. In the Court of Appeal, certain costs were thrown upon the appellant. In all the circumstances of the case, their Lordships think that all the costs of that appeal, including the
A appellant's, may properly be ordered to be paid by the trustees out of income, and their Lordships take the same view as to the costs of all parties before their Lordships' Board. Their Lordships will humbly advise His Majesty that the first three paragraphs of the order of PEDLOW, J., be discharged, and that the following declaration be made in lieu of
B those paragraphs :

> 1. That upon the true construction of the above-mentioned settlement the whole of the expenditure specified in the schedule to the summons should be charged to income exclusively. 2. That the provisions of the Accumulations Act, 1800, do not operate to preclude the payment of the said expenditure out of income. 3. That the trustees of the settlement are not entitled to recoup income out of corpus in respect of the said expenditure.

C Their Lordships also think that so much of the order of the Court of Appeal as orders the plaintiffs to pay the costs of the respondents in that court should be discharged, and that, in lieu, it be ordered that the trustees do retain and pay out of the income of the settled estate the costs of all parties of the appeal to that court, the costs retained by the trustees
D to be taxed as between solicitor and client, and the costs of the other parties on the higher scale. The costs of all parties of the appeal to His Majesty in Council (those of the trustees to be taxed as between solicitor and client) will be ordered to be retained and paid by the trustees out of the income of the settled estate.

E Solicitors : *Whites & Co.* (for the appellant) ; *E. F. Turner & Sons* (for the first respondent) ; *Smith & Hudson* (for the other respondents).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

F BUTLER ESTATES, LTD., AND ANOTHER *v.* BEAN AND ANOTHER.

[KING'S BENCH DIVISION (Lawrence, J.), **May 9, 1941.**]

Landlord and Tenant—Lease—Assignee—Liability for rent—Express covenant with assignor to pay rent—Assignment of benefit of covenant to landlord.

G On June 22, 1928, the plaintiffs let premises to G. & R., Ltd. On Dec. 5, 1935, G. & R., Ltd., assigned the lease to the defendants, who, in the assignment, expressly covenanted to pay the rent and observe the tenant's covenants in the lease. G. & R., Ltd., then went into voluntary liquidation and the plaintiffs claimed in the liquidation £9,000 in respect of future rent. This claim was compromised, G. & R., Ltd., paying
H £530 to the plaintiffs and assigning to them the benefit of the above covenant. Notice of the assignment of the benefit of the covenant was given to the defendants on Jan. 1, 1937. The defendants assigned the lease to G. & R. (1935), Ltd., who in 1940 failed to pay a quarter's rent. The plaintiffs sued the defendants for the rent in arrear, relying upon their rights under the above covenant :—

HELD : (i) the covenant was not a mere covenant of indemnity, but an absolute covenant to pay the rent, and the plaintiffs, as assignees thereof, could sue the defendants for the rent due.

(ii) the defendants were not entitled to be credited with the £530 paid by G. & R., Ltd., to the plaintiffs under the compromise, since that sum was not paid as rent.

[**EDITORIAL NOTE.** A landlord can sue an original lessee upon his covenant to pay the rent and an assignee in possession by reason of the privity of estate; but, in normal circumstances, the landlord has no claim against an assignee who is not in possession. For the protection of the original lessee a chain of indemnities is formed by the incorporation of a covenant of indemnity in each assignment, but this chain is liable to be broken by the liquidation and dissolution of a limited company. This difficulty is commonly avoided by an assignment of the benefit of the covenant of indemnity, but, in the present case, a different course was taken. The assignor took an express covenant to pay the rent and assigned the benefit of this covenant to the landlord, whereupon the landlord, as against that covenantor, was placed in the same position as if that covenantor was the original lessee, and could sue him upon the covenant. The second point is also of importance, since it shows that the landlord does not have to bring into account a sum received upon the assignment of the benefit of the covenant.

As to Liability of Assignee, see HALSBURY, Hailsham Edn., Vol. 20, pp. 364, 365, paras. 440, 441; and for Cases, see DIGEST, Vol. 31, pp. 409-412, Nos. 5548-5586.]

Cases referred to:

(1) *Harris* v. *Boots, Cash Chemists (Southern), Ltd.*, [1904] 2 Ch. 376; 31 Digest 415, *5620*; 73 L.J. Ch. 708.

(2) *Re Perkins, Poyser* v. *Beyfus*, [1898] 2 Ch. 182; 31 Digest 417, *5636*; 67 L.J. Ch. 454; 78 L.T. 666.

(3) *British Union & National Insurance Co.* v. *Rawson*, [1916] 2 Ch. 476; 8 Digest 431, *84*; 85 L.J. Ch. 769; 115 L.T. 331.

(4) *Rendall* v. *Morphew* (1914), 84 L.J. Ch. 517; 8 Digest 431, *83*; 112 L.T. 285.

(5) *Goldsmid-Montefiore* v. *Cavendish Land Co., Ltd.* (1940), Unreported.

Action for the recovery of rent from an assignee who had assigned the lease. The facts are fully set out in the judgment.

Gerald Gardiner for the plaintiffs; *J. L. Stone* for the defendants.

Lawrence, J.: This is an action by landlords for rent, but it is brought, not against assignees who are in possession, but against intermediate assignees who assigned the lease to the assignees who are in possession, and the question is whether the landlords can sue upon a covenant by the defendants to pay the rent in an assignment of the lease to which the landlords were not parties, but the benefit of which the landlords acquired from the original lessee, a company which had been wound up before this action was brought.

On June 22, 1928, the plaintiffs' predecessor leased the premises in question to Gill & Reigate, Ltd. On Dec. 5, 1935, Gill & Reigate, Ltd., assigned the lease to the defendants, who covenanted, *inter alia*, as follows:

> (3) The purchasers hereby jointly and severally covenant with the company as follows, (*a*) to pay the future rent and observe the covenants on the part of the lessee contained in the said lease dated June 22, 1928 . . .

Gill & Reigate, Ltd., also covenanted to go into liquidation. On Dec. 7, 1935, notice of the assignment was given to the plaintiffs. During Dec., 1935, Gill & Reigate, Ltd., went into voluntary liquidation. On Jan. 2, 1936, the plaintiffs claimed by originating summons in the liquidation the sum of £9,000 in respect of possible loss of future rent. On Jan. 9, 1936, the defendants assigned the lease to Gill & Reigate (1935), Ltd., and on Jan. 16, 1936, gave notice of the assignment to the plaintiffs. On Mar. 3, 1936, the plaintiffs' claim was refused by the liquidator of Gill & Reigate, Ltd. On Dec. 1, 1936, as a result of a compromise, all further proceedings on the plaintiffs' originating summons were stayed, and on Dec. 24, 1936, Gill & Reigate, Ltd., assigned to the plaintiffs the benefit of the covenant entered into by the defendants in the assignment of Dec. 5, 1935, and set out above. Notice of this assignment was given to the defendants on Jan. 1, 1937. On Sept. 30, 1937, Gill & Reigate, Ltd., was wound up. Gill & Reigate (1935), Ltd., having failed to pay the quarter's rent due on June 24, 1940, the present action was begun by writ dated Aug. 12, 1940, claiming the sum of £900 as rent.

The defendants contend that the covenant in the assignment of Dec. 5, 1935, is a mere covenant of indemnity, and that, as Gill & Reigate, Ltd., ceased to exist in 1937, before the default, they cannot be called upon to pay, since the party indemnified was never called upon to pay, and was never liable to pay. In my opinion, the covenant in question is not a mere covenant of indemnity. It is in terms an absolute covenant to pay the rent and observe the covenants of the lease. *Harris* v. *Boots, Cash Chemists* (*Southern*), *Ltd.* (1) was dealing with a covenant in the usual form containing an express indemnity. It is clear that such a covenant as the present is assignable (*Re Perkins, Poyser* v. *Beyfus* (2)), and that it is assignable to the principal creditor: *British Union & National Insurance Co.* v. *Rawson* (3).

The plaintiffs in the present case gave up their rights against Gill & Reigate, Ltd., which was a solvent company, in consideration, *inter alia*, of the assignment of the benefit of the covenant in question. The present case is, therefore, distinguishable from *Rendall* v. *Morphew* (4), a case which appears to me not to be altogether inconsistent with the Court of Appeal's judgment in *British Union & National Insurance Co.* v. *Rawson* (3). *Goldsmid-Montefiore* v. *Cavendish Land Co., Ltd.* (5), decided by BENNETT, J., on Dec. 19, 1940, was a case of a covenant of indemnity, and the plaintiff had not taken any steps in the bankruptcy then dealt with. It is, therefore, distinguishable.

It is argued for the defendants that, even if they are liable, they are entitled to credit for the sum of £530 paid to the plaintiffs by Gill & Reigate, Ltd., under the compromise, and interest thereon, but, as this sum was not paid as rent, I do not think that the defendants are entitled to any credit in respect of it in this action. Therefore, there will be judgment for the plaintiffs with costs.

Judgment for the plaintiffs with costs.

Solicitors: *R. C. Bartlett & Co.* (for the plaintiffs; *Preston, Lane-Claypon & O'Kelly* (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

Re HALL, HOLLAND *v.* ATTORNEY-GENERAL.

[CHANCERY DIVISION (Morton, J.), **April 24, 25, 29, May 7, 1941.**]

Estate Duty—Property deemed to pass—Tenant for life paying duty—Release of charge for duty paid—Whether sum representing duty part of estate of tenant for life passing on her death—Finance Act 1894 (*c.* 30) *ss.* 9 (6), 22 (2).

The testator was entitled at his death to certain leasehold and freehold property (hereinafter referred to as the Mornington Estate) which he devised to his wife, Mrs. H., for life, with a power of appointment by will or deed in favour of children or remoter issue. Mrs. H. out of her own money paid estate duty on this property amounting to £7,921 2s. 6d., and during her life, by deeds made in 1928, 1930, and 1936, respectively, she appointed portions of the Mornington Estate (or investments representing a portion of it which had been sold) to her granddaughter absolutely free of all trusts, but subject to her prior life interest. The appointments in 1930 and 1936 were given effect to by conveyances made in 1934 and 1936, respectively. Subsequently, the rest of the estate was sold and the proceeds invested. By her will, dated Dec. 1, 1937, Mrs. H. appointed all the settled property which had not been subject to the deeds, and she died on Oct. 14, 1938. The Crown claimed estate duty on the sum with which Mrs. H. had paid the estate duty on her husband's death, since a charge had thereby been created in her favour by virtue of the Finance Act, 1894, s. 9 (6). The plaintiff contended that it had not been the intention of Mrs. H. to create a charge on the property, and that this was shown by her conduct. It was conceded by all parties, however, that, if such a charge had arisen, it was released in 1920 by the terms of a letter of June 13, 1920, in which Mrs. H. used the words: "which I paid out of my own funds as I would not have a charge on the property." The Crown further contended that, if the charge had been released, estate duty was payable, on the basis that (*a*) by not reclaiming the sum paid Mrs. H. made a personal settlement of this amount to be held on the trusts of her will, or alternatively, (*b*) the settled property was increased by the sum paid in respect of estate duty, which amount had not paid estate duty on the death of the testator, or, alternatively, (*c*) that sum was a gift, and estate duty was payable on a proportion under the Finance Act, 1894, s. 2 (1) (*c*), in that immediate enjoyment was not assumed by the donee to the exclusion of the donor:—

HELD: (i) a charge in respect of the £7,921 2s. 6d. had been created in favour of Mrs. H. It arose automatically under sect. 9 (6), and evidence of actual disclaimer by her was necessary to prevent the operation of this subsection.

(ii) the charge was extinguished in 1920, at the latest, as shewn by the evidence.

(iii) with regard to the further contentions (*a*) it would be a misdescription of what took place to say that a personal settlement was effected, as Mrs. H. merely disclaimed repayment, (*b*) the Mornington Estate, which had paid estate duty on the death of testator, consisted of the houses and land comprised in the bequest under the testator's will, or the investments from the proceeds of sale thereof, and of no other settled property, and (*c*) the claim to estate duty under the Finance Act, 1894, s. 2 (1) (*c*), was ill-founded, as the donees, though not ascertained, took an immediate benefit, to the exclusion of the donor. In the result the duty claimed was not payable.

[**EDITORIAL NOTE.** A tenant for life who pays the estate duty on the settled property out of his own pocket acquires a charge for the sum so paid. If he voluntarily releases that charge, the beneficiaries under the settlement benefit to the extent of the amount of the duty, for, if he had not released it, the capital sum settled would be reduced by that amount. Founding upon this, the Crown has argued that, in some undefined way, the tenant for life by so doing, has settled the amount of the estate duty and on his death duty on that amount must be paid. The court has rejected this argument.

AS TO PROPERTY OF WHICH DECEASED IS COMPETENT TO DISPOSE AT HIS DEATH, see HALSBURY, Hailsham Edn., Vol. 13, pp. 234-236, para. 225; and FOR CASES, see DIGEST, Vol. 21, pp. 42, 43, Nos. 266-272.]

Cases referred to:

(1) *Lord Advocate* v. *Moray (Countess)*, [1905] A.C. 531; 21 Digest 42, *266*; 74 L.J.P.C. 122; 93 L.T. 569.

(2) *Burrell* v. *Egremont (Earl)* (1844), 7 Beav. 205; 40 Digest 695, *2303*; 13 L.J. Ch. 309; *sub nom. Barrell* v. *Egremont (Earl)*, 3 L.T.O.S. 72.

(3) *Morley* v. *Morley, Harland* v. *Morley* (1855), 5 De G. M. & G. 610; 40 Digest 695, *2309*; 25 L.J. Ch. 1.

(4) *Re Harvey, Harvey* v. *Hobday*, [1896] 1 Ch. 137; 40 Digest 695, *2307*; 65 L.J. Ch. 370; 73 L.T. 613.

(5) *De Trafford* v. *A.-G.*, [1935] A.C. 280; Digest Supp.; 104 L.J.K.B. 396; 153 L.T. 17.

(6) *A.-G.* v. *Worrall*, [1895] 1 Q.B. 99; 21 Digest 12, *54*; 64 L.J.Q.B. 141; 71 L.T. 807.

(7) *Re Howe's (Earl) Settled Estates, Howe (Earl)* v. *Kingscote*, [1903] 2 Ch. 69; 21 Digest 43, *277*; 72 L.J. Ch. 461; 88 L.T. 438.

(8) *A.-G.* v. *Seccombe*, [1911] 2 K.B. 688; 21 Digest 13, *59*; 80 L.J.K.B. 913; 105 L.T. 18.

ADJOURNED SUMMONS to determine, *inter alia*, whether estate duty became payable on the death of Mrs. Mary Kate Hall in 1938 in respect of the whole or part of a sum of £7,921 2*s*. 6*d*. The facts are fully set out in the judgment.

Wilfrid M. Hunt for the plaintiff, the executrix.

J. H. Stamp for the first defendant, the Attorney-General.

C. E. Harman, K.C., and *Hubert A. Rose* for the second defendant, the residuary legatee.

MORTON, J.: This is an originating summons taken out by Dame Mary Kate Duval Holland, whom I shall call Dame Holland, as plaintiff. The defendants are the Attorney-General and Mary Hilaire Duval Holland, Dame Holland's daughter, to whom I shall refer as Miss Holland. Dame Holland is the sole executrix of the will of her mother, Mrs. Mary Kate Hall, whom I shall call Mrs. Hall.

The first question raised by the summons is whether upon the death of Mrs. Hall, which took place in 1938, estate duty became payable in respect of the whole or part of a sum of £7,921 2*s*. 6*d*. The facts of the case are these. Immediately prior to his death, Lewis Duval Hall, the husband of Mrs. Hall and the father of Dame Holland, was absolutely entitled to an estate described in his will as follows:

> . . . all my freehold and leasehold lands messuages and tenements at Bayswater Hill and at St. Petersburgh Place Bayswater and in Mornington Crescent (including No. 263 Hampstead Road) and the houses adjacent to and now called Mornington Crescent together with the enclosed garden or pleasure ground in front of Mornington Crescent and my messuages and tenements in Albert Street (including the Victoria public-house) and in Mornington Place and Mornington Road in or near the said borough of St. Pancras . . .

This estate, which I shall call the Mornington Estate, had formerly belonged to Hall's father, Vice-Chancellor Hall.

By his will, dated Aug. 1, 1907, Hall appointed Mrs. Hall, John Lees Casson and the Right Hon. George Ranken Baron Askwith, then George Ranken Askwith, to be the executors and trustees thereof, and, after making certain specific and other dispositions which are not material for the purpose of the present case, he devised the Mornington Estate :

> . . . unto and to the use of my said wife and the said John Lees Casson and George Ranken Askwith their heirs executors and administrators according to the tenure thereof upon trust that my trustees or trustee shall pay the net rents and annual income of the said freehold and leasehold estates to my wife Mary Kate Hall during her life and after the death of my said wife shall stand possessed of the said freehold and leasehold estates in trust for all or such one or more exclusively of the others or other of my children or remoter issue for such estates or estate interests or interest at such age or time or respective ages or times and with such future or other trusts for their respective benefit and such provisions for their respective advancement either in the lifetime of my said wife or after her death and such provisions for their maintenance and education at the discretion of my trustees or trustee or any other person or persons and in such manner in all respects as my said wife shall by any deed or deeds revocable or irrevocable or by will or codicil appoint . . .

There were certain further trusts in default of appointment, which, in the events which have happened, did not take effect. They did not include the usual trusts in default of appointment for the children of Mrs. Hall, but there were certain trusts as to part of the Mornington Estate in favour of the testator's daughter during her life, and in favour of her issue after her death, and, as to other parts of the Mornington Estate, trusts in favour of the testator's son Geoffrey Duval Hall during his life, and his issue after his death.

The testator appointed his three executors to be the trustees for the purposes of the Settled Land Acts, and, after conferring certain powers of management on his trustees, he devised and bequeathed :

> . . . all my real estate of every tenure and wheresoever situate not hereby otherwise disposed of and all the residue of my personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) after payment out of my personal estate of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and the duty on legacies bequeathed free of duty unto and to the use of my said wife Mary Kate Hall her heirs executors administrators and assigns absolutely . . .

The testator made a codicil to his will, dated Feb. 2, 1909, by which he revoked the appointment of Baron Askwith as executor, and he died on Aug. 20, 1909, without having altered or revoked his will except by the codicil, and probate thereof was granted on Dec. 17, 1909, to Mrs. Hall and Casson by the Principal Probate Registry.

The Mornington Estate was valued for the purpose of probate at just over £43,000, and estate duty amounting to £7,921 2*s.* 6*d.* was payable in respect of the Mornington Estate on the death of Hall, whose residuary estate was worth about £10,000.

Messrs. Rawle, Johnston & Co. were the solicitors to the executors, and a bill of costs delivered by them to the executors has been put in evidence. Counsel for the first defendant stated on behalf of the Crown that he raised no objection to the admissibility in evidence of this bill and of certain statements and affidavits to which I shall refer later, and of a letter from Mrs. Hall to Casson. It appears from Messrs. Rawle, Johnston & Co.'s bill that Mrs. Hall was desirous of paying the estate duty on the Mornington Estate out of her own moneys, and that it was contemplated at one time that she should be given a mortgage on the Mornington Estate to secure the sums to be paid by her in discharge of this duty. A mortgage was drafted by counsel and submitted to Mrs. Hall, and there is an entry in the bill of costs dated July 26, 1910, as follows :

> Attending Mrs. Hall on her calling explaining the position of the accounts delivered to the Inland Revenue authority for assessment going through the figures with her in order to explain what sums had to be raised in respect of the duties. Mrs. Hall brought with her the draft mortgage as settled by counsel to secure the advances which she had proposed to make for the payment of the estate duties on the properties devised to her for life, conferring thereon and Mrs. Hall decided that she would not proceed further with the proposed mortgage.

Mrs. Hall subsequently paid the duty, amounting to £7,921 2*s.* 6*d.*—for convenience I shall refer to that sum in round figures as being £7,000—as to £6,600 on Apr. 21, 1911, and as to the balance on June 21, 1911. These dates were not put in evidence, but they appear in the subsequent bill of costs delivered by Messrs. Rawle, Johnston & Co. to Mrs. Hall personally, and all parties are prepared to accept them as correct.

I must now read the Finance Act, 1894, s. 9 (1), (5), (6), in order to see what the effect of this transaction was under the Act :

> (1) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable ; provided that the property shall not be so chargeable as against a *bona fide* purchaser thereof for valuable consideration without notice . . .(5) A person authorised or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof. (6) A person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him.

Of course, the Crown's charge under subsect. (1) disappeared when Mrs. Hall paid the estate duty, but one of the questions argued before me was whether or not, in the circumstances of the present case, Mrs. Hall got the statutory charge conferred by sect. 9 (6). It is suggested that the wishes and intentions of the person paying the money are material on this point, and the evidence in regard to Mrs. Hall's wishes and intentions, in addition to the bill of costs to which I have already referred, is as follows. Dame Holland in para. 19 of her affidavit filed on Aug. 28, 1940, says :

> I was on affectionate and intimate terms with my mother and after my father's death she continually consulted me in regard to financial matters. Mrs. Hall (who was not only tenant for life but also an active trustee of the Mornington Crescent property) was extremely methodical in matters of business and kept notes of all her assets (including particulars of the assets for the time being representing the settled property) and liabilities in a private note book to which I had free and frequent access. This note book contained no reference of any kind to any sums due to Mrs. Hall from her husband's estate in respect of the estate duty provided by her on his death. I am quite satisfied from many conversations which I had with my mother that she always regarded the Mornington Crescent property and the investments representing the same as unincumbered and that her constant desire and object at all

> times after my father's death was that the capital of the settled property and of the investments representing the same should pass to her children and grandchildren entirely unincumbered: and that she considered that this would have been the wish of her father-in-law the late Vice-Chancellor Sir Charles Hall (whose memory and wishes she deeply venerated and under whose will her husband became entitled to the settled property) and I remember her often saying that she considered it her moral duty to safeguard his property in every way.

Then para. 20 is as follows:

> There has very recently been found among Mrs. Hall's papers a copy of a letter of hers dated June 23, 1920. The "John" to whom the letter is addressed is the said John Lees Casson (one of the original trustees of the testator's will) who died in 1925 as previously stated.

Then she exhibits the copy letter and continues as follows:

> I desire to refer to this letter as corroborating what I have said in para. 19 hereof as to Mrs. Hall's desire that the amount of the estate duty provided by her should not be a charge on the settled property.

In para. 3 of her affidavit, filed on Nov. 11, 1940, Miss Holland says:

> With reference to para. 19 of the said affidavit [Dame Holland's affidavit] I remember a conversation which my grandmother Mrs. Mary Kate Hall had with me in or about 1930 with reference to the properties left by the will of my grandfather Lewis Duval Hall and mentioned in para. 2 of the said affidavit. The general effect of what Mrs. Hall said was that, had others been left the properties, they would have been badly off as the properties were in a derelict condition at my grandfather's death; whereas she, on the other hand, having money of her own, was able to spend a large part of the rents in repairs and had paid the duties herself so that the capital value remained untouched. I remember this particular conversation because my grandmother referred to her having acted in accordance with what would have been the wishes of my grandfather and great-grandfather. The exact words used by Mrs. Hall with reference to her payment of duties were, so nearly as I can remember, as follows: "I even paid the duties out of my own pocket to keep the properties intact as grandpapa and great-grandpapa would have wished."

I shall consider later the question whether, in the circumstances of this case, sect. 9 (6) operated so as to give Mrs. Hall a charge on the estate for the £7,000 she paid in respect of estate duty in 1911, and the further question whether, if she got such a charge, the Mornington Estate was freed from that charge at any time before Mrs. Hall's death.

I must refer at this stage to the later history of the case. Casson died on Aug. 19, 1925, and by a deed, dated Mar. 10, 1926, and made between Mrs. Hall of the one part and Baron Askwith of the other part, the latter was appointed to be a trustee of the testator's will in the place of Casson. By a vesting deed, dated Mar. 11, 1926, and made between Mrs. Hall and Baron Askwith of the one part and Mrs. Hall of the other part, it was declared that the freehold properties therein described, being so much of the settled property as then remained unsold, and including the property described in the schedule to the deed of June 18, 1930, to which I shall refer hereafter, was vested in Mrs. Hall in fee simple upon the trusts and subject to the powers and provisions upon and subject to which the same ought to be held from time to time.

On July 19, 1928, Mrs. Hall executed a deed of appointment and surrender which was made between Mrs. Hall of the one part and Mrs. Hall and Baron Askwith of the other part. This deed was expressed to be supplemental to the testator's will and codicil, and there were recitals of the will and of the codicil and of the appointment of a new trustee by the deed of Mar. 10, 1926. Then there is the following recital:

> Portions of the freehold and leasehold hereditaments so settled by the will of the

> testator as aforesaid have from time to time been sold and the proceeds of the sale of part of the premises so sold are now represented by the investments specified in the schedule hereto (hereinafter called the scheduled investments) which said investments stand invested in the joint names of the trustees as being the present trustees for the purposes of the Settled Land Act, 1925, of the settlement of the said freehold and leasehold hereditaments made by the will of the testator as aforesaid.

A It is to be observed that there is no mention in this deed, and there is no mention in any of the subsequent deeds to which I shall refer, of any charge existing in favour of Mrs. Hall. Then there is a recital as follows:

> Mrs. Hall is desirous of making such irrevocable appointment and surrender in favour of Mary Hilaire Duval Holland of 45 Carlisle Mansions Victoria Street in the county of London who is a granddaughter of the testator and of herself Mrs. Hall as B hereinafter appears.

Then the operative part is as follows:

> 1. Mrs. Hall in exercise of the recited power in this behalf conferred upon her by the will of the testator and of every other power enabling her hereby irrevocably appoints that the scheduled investments shall be held in trust for the said Mary Hilaire Duval Holland absolutely subject to the prior life interest of her Mrs. Hall C therein. 2. Mrs. Hall hereby assigns and surrenders unto the trustees all that the life interest of her Mrs. Hall of and in the scheduled investments to the intent that such life interest shall forthwith merge in the reversionary interest in the scheduled investments hereinbefore appointed in favour of the said Mary Hilaire Duval Holland and be held in trust for her absolutely and so that the scheduled investments shall be immediately transferable to the said Mary Hilaire Duval Holland discharged from all the trusts powers and provisions of the said will and codicil of the testator.

D The investments in the schedule are of the nominal value of just over £10,000.

At this point, I shall go back to the letter of June 23, 1920, which I intended to read when I read para. 20 of Dame Holland's affidavit. The letter is to Casson, and begins as follows:

> E My dear John,
>
> In reply to your letter I quite agree that a trust book should be kept, and I have always had one with the accounts of Charlie's and Geoffrey's funds, and directly this Mornington Crescent sale was completed I was going to instruct the same chartered accountant . . . who kept my accounts when receiver for Charlie, should continue keeping all the trust fund acs. and then would from time to time send it to you for inspection, as I have done with the trustee's banker's pass book . . . Mr. F Griffiths [the solicitor at that time advising Mrs. Hall, and the executor of Mr. Hall's will] suggested that this excess sum should be deducted from the purchase money as also the estate duty for M. Crest, alone approximately amounting to £7,000 which I paid out of my own funds as I would not have a charge made on the property I told him I did not wish this done that I prefer the whole of the purchase money minus the expenses of the sale, should be handed over in full to the trustees.

It appears from that letter that some part of the Mornington Estate had G been sold, and that the suggestion of Griffiths, the solicitor, related to the proceeds of that sale.

I now continue the subsequent history. On June 18, 1930, Mrs. Hall executed another deed of appointment and surrender. It is again made between Mrs. Hall of the one part and Mrs. Hall and Baron Askwith of the H other part. There are recitals of the will and codicil of the testator and of other matters, and then there is a recital as follows:

> The property set out in the schedule hereto (hereinafter called the scheduled property) comprises part of the freehold and leasehold hereditaments so settled by the will of the testator as aforesaid.

Then there is a recital of the desire of Mrs. Hall to make the appointment and surrender, and there follows in the operative part an appointment that the scheduled property shall be held in trust for Miss Holland absolutely, subject to the prior life interest of Mrs. Hall therein. Then there follows para. 2 ;

> Mrs. Hall hereby assigns and surrenders unto the trustees all that the life interest of Mrs. Hall of and in the scheduled property to the intent that such life interest shall forthwith merge in the reversionary interest of the scheduled property hereinbefore appointed in favour of the said Mary Hilaire Duval Holland and be held in trust for her absolutely and so that the scheduled property shall be immediately transferable to the said Mary Hilaire Duval Holland discharged from all the trusts powers and provisions of the said will and codicil of the testator.

That deed was followed by a conveyance, dated Jan. 20, 1934, and made between Mrs. Hall of the one part and Miss Holland of the other part. It recites the vesting deed of 1926, and then there follows this recital :

> The grantee [Miss Holland] is absolutely entitled in equity in fee simple to the freehold property hereinafter described and hereby assured freed and discharged from the trusts powers and provisions mentioned and referred to in the said vesting deed as the trustee does hereby admit and has requested the trustee to make such conveyance of such property to her as is hereinafter contained.

The operative part is as follows :

> The trustee as trustee hereby conveys unto the grantee all and singular the freehold property described in the schedule hereto to hold the same unto the grantee in fee simple . . .

Then there is the acknowledgment of the right of the grantee to the production of certain documents. The property specified in the schedule is the same as the property comprised in the appointment and surrender of June 18, 1930. I think that it is abundantly clear that, when these deeds were executed, Mrs. Hall had no idea that any charge in her favour still existed upon the settled property. If any such idea had been in her mind, or in the minds of those advising her, I think that there would certainly have been some reference to this charge in the deeds.

On Jan. 14, 1936, two further deeds were executed. The first was a deed of appointment and surrender made between Mrs. Hall of the one part and Miss Holland of the other part. After certain recitals which I need not read, there is the following recital ;

> And whereas the appointor [Mrs. Hall] has determined to make such appointment of the said premises at Bayswater Hill and St. Petersburgh Place aforesaid in favour of the appointee [Miss Holland] as is hereinafter contained and also to release to or in favour of the appointee her life interest in the premises so to be appointed to the appointee NOW THIS DEED WITNESSETH that in pursuance of her determination aforesaid the appointor in exercise of the power in that behalf conferred on her by the said will of the testator and of every and any other power enabling her in that behalf hereby irrevocably appoints that subject to her own equitable life interest herein all those the hereditaments and premises described in the said schedule hereto shall be held in trust for the appointee in fee simple absolutely.

Then there is an assignment and surrender of the equitable life interest of Mrs. Hall in the hereditaments described in the schedule to the intent that the appointee may become and be entitled to the equitable fee simple thereof in possession. The schedule describes certain pieces of land forming part of the Mornington Estate.

On the same day a conveyance was executed, made between Mrs. Hall of the one part and Miss Holland of the other part. After reciting the vesting deed of 1926, the document continues as follows :

> And whereas the grantee is absolutely entitled in equity in fee simple to the freehold

> property hereinafter described and hereby assured freed and discharged from the provisions mentioned and referred to in the said vesting deed as the trustee does hereby admit and has requested the trustee to make such conveyance of such property to her as is hereinafter contained which the trustee has agreed to do.

Then there follows a conveyance to Miss Holland in fee simple of the A property described in the schedule, which is identical with the schedule to the appointment and surrender of the same date. It is to be observed that the two last-mentioned deeds, unlike the earlier documents, were executed within three years of Mrs. Hall's death.

After the execution of each of the deeds of appointment to which I have B referred, Miss Holland entered into, and thereafter remained in receipt and enjoyment of, the income of the investments, or the net rents and profits, of the part of the settled property in which Mrs. Hall had released her life interest. During Mrs. Hall's lifetime, the whole of the settled property other than that which was comprised in the appointments of C June 18, 1930, and Jan. 14, 1936, the conveyances of Jan. 20, 1934, and Jan. 14, 1936, was sold, and the whole of the net proceeds of sale were invested, and, except for the investments comprised in the appointment of July 19, 1928, the income thereof was paid to Mrs. Hall during her life.

Mrs. Hall made her will on Dec. 1, 1937. By cl. 1 thereof, she appointed D Dame Holland to be her sole executrix. Clauses 2 to 6 inclusive contain certain dispositions which are not material for the purpose of this case, and cl. 7 provides as follows:

> Whereas under the provisions of the will and codicil of my late husband Lewis Duval Hall . . . there was conferred upon me a power of appointment in respect of (*inter alia*) the hereditaments in Mornington Crescent including No. 263 Hampstead E Road together with the garden or pleasure ground in front of Mornington Crescent all in the county of London devised by the said will as therein mentioned or the proceeds of sale thereof and whereas such property has been sold and the net proceeds of sale thereof invested as provided for in the said will now I hereby in exercise of my said powers appoint that the investments representing the net proceeds of sale of the said hereditaments in Mornington Crescent including No. 263 Hampstead Road together with the garden or pleasure ground in front of Mornington Crescent in and by the said will devised as therein mentioned shall from and after my death be held by F the trustees of the said will and codicil upon trust for Lady Holland absolutely if she shall survive me but if she shall die in my lifetime then upon trust for Mary Holland [Miss Holland] absolutely.

Then cl. 8 provides as follows:

> I give devise and bequeath all my real and personal estate whatsoever and wheresoever and all property over which I may have at the date of my decease a general G power of appointment or disposition by will not hereby otherwise disposed of subject to the payment thereout of all my funeral and testamentary expenses and debts and the legacies bequeathed by this my will unto my said granddaughter Mary Holland [Miss Holland] absolutely.

Mrs. Hall died on Oct. 14, 1938, without having altered or revoked her will, and probate thereof was granted to Dame Holland on Nov. 16, 1938, H by the Principal Probate Registry. On Mrs. Hall's death, the Crown claimed that, by reason of the facts which I have stated, estate duty was chargeable in respect of a sum of £7,921 2*s*. 6*d*. In respect of part of that sum, the claim was put forward in correspondence on various grounds, but the grounds now relied upon are those put forward by counsel at the hearing. All the correspondence took place before the plaintiff had discovered and put in evidence the letter to Casson of June 23, 1920.

In my judgment, the Crown's claim is ill-founded, and I shall state my reasons quite shortly and simply. Before dealing with the various points put forward by counsel for the Crown in his forcible and ingenious argument, what was settled by Hall's will was the Mornington Estate. Estate duty on that settled property was paid after his death by Mrs. Hall. I accept the argument of counsel for the Crown that Mrs. Hall got a charge on the Mornington Estate for the amount of the duty so paid, and that she released that charge in 1920. The latter argument was supported by the other counsel concerned in the case to the extent that they agreed that, if Mrs. Hall ever got a charge, it was released at latest in 1920. That which passed, or was deemed to pass, on Mrs. Hall's death within the meaning of the relevant statutes was, in my view, the Mornington Estate less those portions thereof which had been dealt with by the deeds of 1928, 1930 and 1934. The portion thereof dealt with by the deeds of Jan. 14, 1936, was deemed to pass on her death by reason of the Finance Act, 1900, s. 11 (1), which provides as follows :

> In the case of every person dying after Mar. 31, 1900, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting or disposition was *bona fide* made or effected 12 months before the death of the deceased, and *bona fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise.

The period mentioned in that section was extended to 3 years by the Finance Act, 1910, s. 59 (1).

In my view, none of the transactions to which I have referred has the result of bringing into being any property other than the Mornington Estate which passed on Mrs. Hall's death.

In the absence of sect. 5, to which I shall now refer, estate duty would have been payable on the Mornington Estate less the portions thereof dealt with by the deeds of 1928, 1930 and 1934. However, the Finance Act, 1894, s. 5 (2), provides as follows :

> If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not nor shall any of the duties mentioned in the fifth paragraph of the first schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property . . .

The exemption from estate duty given by that subsection was abolished except as between parties to a marriage where the death occurred after Aug. 15, 1914, by the Finance Act, 1914, s. 14. Mrs. Hall was the wife of Hall, and she was not at any time competent to dispose of the Mornington Estate within the definition of the words in sect. 22 (2) (*a*) of the same Act. Estate duty had been paid in respect of the Mornington Estate since the date of the settlement—that is, since the date when Hall's will came into operation—and, therefore, no duty was payable in respect of the

Mornington Estate on the death of Mrs. Hall. That is the view which I have formed after careful consideration of the arguments of counsel for the Crown, but I shall now endeavour to state those arguments and express my views upon them.

The first contention on behalf of the Crown is shortly as follows. Mrs. Hall did get a charge in 1911 when she paid the £7,000 estate duty. In June, 1920, when she could have directed the proceeds of sale to be applied in paying off that charge, and when she was offered repayment by Griffiths, she directed the funds to be paid to the trustees. Thereby she settled £7,000 and freed the property from her charge. Thereafter, there was somewhere amongst the capital moneys held on trust under Hall's will a sum of £7,000 settled by Mrs. Hall. It could not be said which of the capital moneys represented that sum, but, when it was put into settlement by Mrs. Hall in 1920, that sum did not bear estate duty on Hall's death, and it passed on Mrs. Hall's death. This argument involves three propositions. The first is that Mrs. Hall got a charge on the Mornington Estate when she paid the estate duty in 1911. On this point, I agree with the argument for counsel for the Crown. Notwithstanding the fact that Mrs. Hall had refused to have a mortgage executed in her favour in 1910, I think that the charge came automatically into existence under the Finance Act, 1894, s. 9 (6) in 1911, when she paid the duty.

On this point, I was referred to *Lord Advocate* v. *Moray* (*Countess*) (1). The facts of that case were as follows, at pp. 532, 533 :

> The appellant was the Lord Advocate, who claimed, at the instance of the Inland Revenue, firstly, an account ; and, secondly, estate duty and legacy duty on a sum of £37,740 from the late Earl of Moray's trustees, the respondents. The deceased, Edmund Archibald Stuart, Earl of Moray, who was institute or heir of entail of the Moray entailed estates, died on July 11, 1901. He had succeeded to the Earldom of Moray and the entailed estates in 1895. As heir of entail in possession he was, in the terms of the Finance Act, 1894, s. 8 (4), accountable for the estate duty on the property, and, as he was not entitled to disentail without consents, both estate duty and settlement estate duty then became payable on the value of the estate under sect. 23 (16) of the Act. He preferred to pay these duties in sixteen half-yearly instalments, and he had at his death paid out of his own funds eleven out of the sixteen instalments due. These payments amounted to £37,740. By his trust disposition and settlement the Earl assigned on trust for certain purposes to his trustees, the respondents, the whole estates heritable and movable which should belong to him or of which he should have the power of disposal at his death, excepting the said entailed estate and some lands held along with them. He directed his trustees, whom he also appointed his executors, in the event of any of the above-mentioned instalments being due at his death, to pay the same, and to apply to the court for an order on the succeeding heir of entail to grant bonds in their favour for the amount so paid by them. But he gave no similar directions with regard to the instalments he himself had already paid. The Crown, founding on . . . sect. 22 (2) (*a*), (*c*), claimed estate duty on the sum of £37,740. The respondents had not in fact received the sum of £37,740, and they alleged that the Finance Act did not provide any means whereby this sum could be recovered from the entailed estate or heir in possession ; and they refused to give an account of the instalments paid, or pay the duties claimed.

The First Division, affirming the decision of the LORD ORDINARY, held that the duties were not payable by the respondents. The argument of counsel for the appellant included this passage, at p. 533 :

> The subsection [sect. 9 (6)] creates automatically a charge. Earl Edmund became entitled to that charge, and might have released the entail from that charge ; and if this had been done 12 months before his death no estate duty would have been due ; but he did not convey it away *inter vivos*.

Then Lord Macnaghten, after setting out the provisions of the Finance Act, 1894, s. 9 (6), said, at pp. 539, 540 :

> He has, therefore, a statutory charge upon the property of the same effect and validity as if the charge had been created by a mortgage duly executed by a person or persons capable of creating such a charge. As applied to England and English land, the enactment is too clear for argument. The charge arises automatically. A person who is declared by statute to be entitled to a charge on doing a certain act gets the charge on doing the act by virtue of the statute. Nothing more is required to be said or done to perfect his security.

Later, Lord Davey said, at p. 542 :

> As to the meaning of the words in subsect. (6), apart from any technical difficulties of application, I should have thought there could not be any difference of opinion. They appear to me to mean that the limited owner who has paid the duty is put in the same position as if he had lent the money for the purpose on the security of a mortgage of the estate to himself. And I think the subsection gives him all the rights of the holder of a valid and effectual security on the property. To construe the words as meaning only that he may give himself such a charge seems to me at variance with the plain meaning of the language used, and to give no effect to the words at the end of the section which the legislature has used for the purpose of defining the nature of the charge to which the limited owner has become entitled on payment.

It is pointed out by counsel for the plaintiff that in *Lord Advocate* v. *Moray* (*Countess*) (1) there would appear to have been no evidence as to the intention of the Earl when he paid the duty, and that in the present case there is evidence that Mrs. Hall did not want to get a charge. He submits that the evidence is sufficient to enable the court to hold that the charge was disclaimed by Mrs. Hall, with the result that it never came into existence, or, if it came automatically into existence, it forthwith ceased to exist. On the question of disclaimer, he referred to Norton on Deeds, 1906, pp. 19, 20, and, on the question of intention to extinguish the charge, he referred to *Burrell* v. *Egremont* (*Earl*) (2), *Morley* v. *Morley* (3) and *Re Harvey, Harvey* v. *Hobday* (4). The principle to be deduced from these and other cases is stated (in my view, accurately) in Fisher and Lightwood, Law of Mortgage, 7th Edn., p. 669 :

> The rule that merger *prima facie* results from the union of the charge and the land in the same person applies where the interests are absolute. When a tenant for life or other limited owner becomes entitled to the charge the position is reversed. *Prima facie* there is no merger, for it is not to be supposed that he will discharge a debt on another man's estate. Hence merger only results when the tenant for life shows an intention that the charge shall be extinguished for the benefit of the remaindermen. The burden of proof is on those who claim to have the estate exonerated ; and this is so even where the remainderman is the child of the tenant for life.

I think that it is extremely likely that, if Mrs. Hall had been told that she would automatically get a charge under sect. 9 (6) on paying off the estate duty, she would have said : " I do not want such a charge." In my view, however, there is no evidence at all that her attention was directed to this matter, either at or before the time when she paid the duty. It is true that in 1910 she was offered a mortgage and refused it, but the bill of costs contains no entry showing that her attention was directed to the effect of sect. 9 (6), and, while I entirely accept the evidence of Dame Holland and Miss Holland, it throws no light on the question whether Mrs. Hall was aware of this statutory provision.

In my judgment, in order to establish that the charge given by sect. 9 (6) did not arise automatically on payment of estate duty on the Mornington Estate by Mrs. Hall, the plaintiff must at least prove that Mrs. Hall was aware of the provisions of that subsection at or before the time when she paid the duty, and that she formed an intention to disclaim or release the particular charge given by the subsection. I am prepared to assume in favour of the plaintiff, without deciding the point, that, if these facts were proved, the charge given by sect. 9 (6) would never arise, or, having arisen, would immediately be extinguished. It may have to be decided hereafter whether the principle of such cases as *Burrell* v. *Egremont* (*Earl*) (2), *Morley* v. *Morley* (3) and *Re Harvey*, *Harvey* v. *Hobday* (4) applies to the statutory charge given by sect. 9 (6), having regard to the observations of LORD MACNAGHTEN and LORD DAVEY in *Lord Advocate* v. *Moray* (*Countess*) (1) which I have quoted, and in particular to the observations of LORD MACNAGHTEN, at pp. 539, 540. It is not necessary that I should express any opinion on this point, as, in my view, the plaintiff has failed to prove any facts which establish or lead to the necessary inference that Mrs. Hall addressed her mind to the charge arising under sect. 9 (6) at or before the date when she paid the duty and formed an intention to disclaim or release that charge. I cannot see how any person can disclaim a benefit conferred by statute without being aware of the existence of that benefit, nor can I find anything in the textbooks or authorities referred to by counsel for the second defendant which leads me to the contrary view. Moreover, if the statutory charge arose in 1911, it seems to me that there is no evidence that Mrs. Hall did anything between 1911 and 1920 which would operate as a release of the charge.

The second proposition involved in the first contention of counsel for the Crown is that Mrs. Hall freed the Mornington Estate from her charge by the attitude which she adopted at the time when she wrote the letter of June 23, 1920. This proposition is supported by all counsel engaged in the case. Counsel for the second defendant argued that, if Mrs. Hall got a charge in 1911, it must have ceased to exist in 1940 at the latest. *Prima facie* it would be to Miss Holland's interest to contend that the charge still existed at Mrs. Hall's death, in which event the benefit of the charge would have passed to Miss Holland under the gift in Mrs. Hall's will, yet her counsel conceded that, if the charge ever came into being, it ceased to exist in 1920 at latest. There may have been reasons why Miss Holland desired this concession to be made. She may not have wished to claim a charge on the property appointed to her mother, and she may not have wished her counsel to advance any argument which would increase the rate of estate duty payable on Mrs. Hall's death.

In a letter dated June 19, 1940, the Solicitor of Inland Revenue put forward very clearly the contention that the charge in Mrs. Hall's favour did not merge, but remained an asset of her estate which passed to her personal representative. That letter was written, as I have said, before Mrs. Hall's letter to Casson of June 23, 1920, had been discovered and put in evidence, and at an early stage of the hearing before me counsel for the

Crown stated that he would not contend, in view of the last-mentioned letter, that the charge existed after 1920. Nor did he so contend, although he did point out that, if the charge was never destroyed in Mrs. Hall's lifetime, it must still have existed at her death, and duty would be payable thereon on the footing that it was an asset belonging absolutely to Mrs. Hall at her death. For my own part, I feel grave doubts whether the letter of June 23, 1920, or Mrs. Hall's conduct at the time when she wrote that letter, amounted to a release of the charge created in her favour by sect. 9 (6). It seems to me that the words " which I paid out of my own funds as I would not have a charge made on the property " may be only a statement by Mrs. Hall of what had happened shortly after her husband's death, when she refused to have a mortgage executed in her favour, while the concluding words of the letter may amount at most to no more than a release from the charge of the purchase money resulting from the sale made in 1920. This was a sale of part only of the Mornington Estate, as part of the estate was still unsold when the deed of June 18, 1930, was executed.

Notwithstanding the doubt which I feel, I have arrived at the conclusion that the whole of the Mornington Estate was effectively released from Mrs. Hall's charge in 1920. No authority has been cited to me which deals with the means by which property can be released from a charge which has arisen under the Finance Act, 1894, s. 9 (6), but it seems clear that the subsection does not operate to vest a legal estate, and counsel for the second defendant pointed out that it is treated as being an equitable charge in the Land Charges Act, 1925, s. 10 (1) (*c*) (ii). I think that it is a fair inference from the letter of June 23, 1920, that Griffiths had drawn Mrs. Hall's attention to the fact that she had a statutory charge on the property. She knew that no mortgage had been executed in her favour, and the use of the expressions " I did not wish " and " I prefer " indicate that she knew that she possessed a charge which she could have enforced if she had so desired. In these circumstances, I think that, on the whole, and in the absence of argument to the contrary, counsel are right in their submissions that Mrs. Hall's letter and conduct in 1920 amounted to a complete release of the charge.

I must now consider the last proposition involved in the first argument of counsel for the Crown. He said that Mrs. Hall by her conduct in 1920 made a personal settlement of £7,000, and that thereafter the sum so settled was held upon the trusts declared by Mrs. Hall's will. He agreed that he could not identify the investments which represented this sum, but he said that this did not matter, and referred me to the opinion of Lord Russell of Killowen in *De Trafford* v. *A.-G.* (5), at p. 291. I am not quite sure how counsel for the Crown would deal with the point that certain capital moneys, of a nominal value of over £10,000, were dealt with by the deed of July 19, 1928. These may be the very same capital moneys out of which Mrs. Hall was offered recoupment of the £7,000 in 1920. If so, it would seem that the personal settlement of

£7,000 which was made, according to counsel for the Crown, in 1920, may have been put an end to in 1928. However, this does not matter, for, in my view, the argument of counsel for the Crown is ill-founded, because it does not accord with all the facts. In 1920, Mrs. Hall might have insisted on her charge being paid off. She might then have made a settlement of the money paid to her with the trusts subsisting under her husband's will in regard to the Mornington Estate, or the capital moneys then forming part of the Mornington Estate. She might have appointed Casson and herself to be trustees of that settlement, and Casson might have agreed to accept that office. If she had done all of these things, the Mornington Estate would have been depleted by £7,000 and a new settlement would have come into being. In fact, however, she did none of these things. She merely disclaimed repayment, whereby, as counsel for the Crown has himself argued, she released the Mornington Estate from her charge. In my view, it is a misdescription of the transaction to say that in effect Mrs. Hall received £7,000 and made a settlement of that sum.

Counsel for the Crown next said in effect that, if Mrs. Hall did not make a personal settlement of part of the proceeds of sale in 1920, she must have settled something which was worth £7,000. Immediately on Mrs. Hall's death, the Mornington Estate became subject to a charge for estate duty amounting to £7,000. Thus, that which was in settlement was worth not £43,000, but £43,000 less £7,000. By getting rid of that charge, Mrs. Hall brought the value up to £43,000 again. She must, therefore, have brought into settlement something which was worth £7,000. That "something" did not pay duty on Hall's death. It was a benefit spread over the whole of the Mornington Estate. When, therefore, part of the settled property was appointed by Mrs. Hall, and she released her life interest therein, part of that something ceased to be in settlement. Therefore, the Crown cannot claim duty on the whole of that something, but only on a part thereof proportionate to the value of the portion of the Mornington Estate which remained in settlement. To the extent of that part of the "something," the property which passed on Mrs. Hall's death was different from the property which passed on Hall's death, and on which estate duty was paid on his death.

Counsel for the Crown had some difficulty, I thought, in defining what that "something" was. At one stage he endeavoured to get out of that difficulty by submitting that all that was settled by Hall was the Mornington Estate less the charge of £7,000 for estate duty. He also submitted that estate duty had been paid since Hall's death, not in respect of the unincumbered Mornington Estate, but only in respect of that estate burdened with the estate duty payable on Hall's death. In my view, these submissions do not correspond with the facts. The settled property in respect of which estate duty was paid within the meaning of sect. 5 (2) was the Mornington Estate. That is the estate which passed on Hall's death within the meaning of sect. 1 of the Act.

The truth is, as I see it, that this " something " which is said to have been settled by Mrs. Hall never had any existence at all. The benefit conferred by Mrs. Hall on the Mornington Estate when she got rid of the charge may well have been equivalent to an out-and-out gift, but the property in settlement was at all times the land and houses settled by Hall, or the proceeds of sale of such of them as were sold from time to time There was no other settled property in existence. It seems to me that counsel for the Crown pictures Mrs. Hall as spreading over all the Mornington Estate what I may call a cloak of benevolence, which covered every bit of it and in some mysterious way was settled with it. He ascribes to that cloak of benevolence the value of £7,000. The short answer is, in my view, that no such cloak of benevolence ever existed. It is, to my mind, no more than a product of counsel's imagination, and is not property which is taxable.

The next argument of counsel for the Crown was as follows. Mrs. Hall either did not get a charge, or, having got one, subsequently released it. If she did not make a settlement of £7,000, she made a gift of that value to the persons successively entitled to the Mornington Estate under the settlement made by her husband's will. This gift was made by paying the estate duty on her husband's death if she did not get a charge under sect. 9 (6), or by releasing her charge if she did get one. This gift was made with the reservation of the benefit of Mrs. Hall, the donor, because she got the benefit of the release as tenant for life, and, accordingly, duty is payable in respect of this gift under the Finance Act, 1894, s. 2 (1) (*c*). Counsel for the Crown concedes, however, as I understand him, that, on this footing, duty is not payable on the whole of the £7,000, because Mrs. Hall released her life interest in certain portions of the Mornington Estate in 1928 and in 1930. In my judgment, any claim based on sect. 2 (1) (*c*) is ill-founded. That subsection provides as follows :

> Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (*c*) Property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11, if those sections were herein enacted and extended to real property as well as personal property, and the words " voluntary " and " voluntarily " and a reference to a " volunteer " were omitted therefrom . . .

That subsection read by itself is not very easy to follow, but the effect of it is conveniently set out in HANSON ON ESTATE DUTIES, 7th Edn., p. 76 :

> . . . or property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

In view of *A.-G.* v. *Worrall* (6), I am prepared to assume that Mrs. Hall made a gift of £7,000. Clearly, the donee must have been the person entitled in remainder after Mrs. Hall's death, since a donor cannot make a gift to herself. These persons, although they were unascertained at the time of the gift, took an immediate benefit, since a burden was removed from the inheritance. That benefit, in my view, they thereafter retained to the entire exclusion of the donor, or of any benefit to her by contract or otherwise.

I have already held that Mrs. Hall got a charge and released it in 1920. She got no benefit whatsoever from that release. Before the release, she was tenant for life of the Mornington Estate, and the interest (if any) payable in respect of her charge was payable out of the income of the estate. That is, it was payable out of her own pocket. I say "the interest (if any)" because it was suggested in argument that the charge conferred by sect. 9 (6) bears no interest. Support for this view seems to be afforded by the judgment of COZENS-HARDY, L.J., in *Re Howe's* (*Earl*) *Settled Estates*, *Howe* (*Earl*) v. *Kingscote* (7), at p. 81. For the present purpose, however, it is immaterial whether or not the charge bore interest. After the release, Mrs. Hall had parted with a charge worth £7,000, and had received no benefit whatever from any source. She simply remained tenant for life of the Mornington Estate, as she had been before. This fact is, in my view, a sufficient answer to the argument of counsel for the Crown, and I need not go on to discuss the effect of the words "by contract or otherwise." These words were considered in *A.-G.* v. *Seccombe* (8), and in the present case it might be material to note that, during the period up to 1920 and for some years after that, there was no appointment by Mrs. Hall, so that up till that date it was wholly uncertain who would take the Mornington Estate on her death. That might make it more difficult to establish any benefit to Mrs. Hall by contract or otherwise, if it were material to consider the point.

If I had felt that any benefit at all resulted to Mrs. Hall, the artificial nature of the argument for the Crown may be well illustrated by considering what would have happened if Hall had settled the Mornington Estate on his daughter for life with remainder to her issue, and the daughter had paid the estate duty of £7,000 payable on his death and had then released the charge arising under sect. 9 (6). In that event, sect. 5 (2) would not have operated to save the Mornington Estate from bearing estate duty on the daughter's death. I hazard a guess that in that event duty would simply have been claimed on the Mornington Estate, and, in my view, it would have been rightly so claimed. But for the fact that sect. 5 (2) still applies in the case of the settlor's wife, I do not think that it would ever have occurred to anyone to suggest that that which remained in settlement after 1920 was, not the Mornington Estate, but the Mornington Estate less £7,000 plus property which did not bear duty on Mrs. Hall's death of the value of £7,000.

Declaration that estate duty not payable.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Shepherds & Bingley*, Kensington (for the plaintiff and for the second defendant); *Solicitor for Inland Revenue* (for the first defendant).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law*].

ATTORNEY-GENERAL *v.* KITCHIN AND OTHERS.

[King's Bench Division (Lawrence, J.), **April 29, 30, May 1, 2, 9, 1941.**]

Estate Duty—Property passing on death—Irrevocable voluntary settlement—Family arrangement—Interest reserved to settlor— Customs and Inland Revenue Act, 1889 (*c.* 7), *s.* 11—*Finance Act*, 1894 (*c.* 30), *ss.* 1, 2 (1) (*c*), 3 (1), (2).

On Nov. 18, 1921, B. made an irrevocable voluntary settlement of shares in an American company in favour, *inter alia*, of certain of his sisters and nephews. On Aug. 28, 1922, the trustee sold the trust property to an English company in return for shares and debentures therein. B. then recollected that he was under a liability to his deceased brother's estate, and was also dissatisfied with the settlement on the ground that it was irrevocable. Counsel advised him that, since he had forgotten this liability and had been under the impression that he could vary the settlement, it was possible that he might be entitled to have it set aside. After lengthy negotiations, B.'s sisters and nephews entered into a family arrangement on Nov. 11, 1922, whereby, *inter alia*, a life interest in the property the subject of the settlement was reserved to B., who was also granted the right to raise from the trust fund a sum sufficient to meet his liability of $300,000 to his deceased brother's estate, the amount of the annuities payable to his sisters and nephews also being altered. On Dec. 16, 1922, stamp duty was charged on the family arrangement as on a conveyance on sale. B. died on Aug. 21, 1939, having waived his right to raise the $300,000. The Crown claimed estate duty on the property comprised in the settlement and family arrangement as property passing on the death of the deceased under the Finance Act, 1894, s. 1. Alternatively, they claimed that the property comprised therein was liable under sect. 2 (1) (*c*), on the ground that B. had reserved an interest to himself in respect thereof. The Crown conceded that, as stamp duty had been paid on the $300,000 and on the annuities, the case should be treated as a purchase for partial consideration under sect. 3 (2) :—

Held : (i) the family arrangement was, in its essence, a business arrangement, and was made for valuable consideration. The property comprised in it was, therefore, exempt from estate duty under sect. 3 (1).

(ii) sect. 2 (1) (*c*) did not apply, since the reservation of an interest to B. was made not by the voluntary settlement, but by the family arrangement.

[**EDITORIAL NOTE.** *Lethbridge* v. *A.-G.* (1) established that a family arrangement may also be a bargain and sale. As Lord Atkinson pointed out in that case, it is the substance of the transaction which is to be looked to, rather than the form of conveyance which may have been adopted. In the present case, the consideration for the family arrangement was, in effect, that the settlor should refrain from exercising his hypothetical right to have the voluntary settlement set aside. Another interesting point arising out of this case is that the Finance Act, 1894, s. 2 (1) (*c*), refers only to an interest reserved to the settlor by the voluntary settlement. The fact that an interest is reserved to the settlor by a subsequent family arrangement varying the voluntary settlement made *bona fide* and for valuable consideration does not suffice to make the property comprised in it liable to estate duty under the subsection.

As to Exceptions from Charge of Duty where Consideration Given, see HALSBURY, Hailsham Edn., Vol. 13, pp. 251, 252, paras. 244, 245 ; and for Cases, see DIGEST, Vol. 21, pp. 17-19, Nos. 97-110.]

Cases referred to:

(1) *Lethbridge* v. *A.-G.*, [1907] A.C. 19; 21 Digest 18, *99*; 76 L.J.K.B. 84; 95 L.T. 842; *revsg.*, [1905] 2 K.B. 323.

(2) *A.-G.* v. *Boden*, [1912] 1 K.B. 539; 21 Digest 9, *35*; 81 L.J.K.B. 704; 105 L.T. 247.

INFORMATION to recover estate duty claimed upon the death of William Henry Benn (hereinafter called the deceased), who died on Aug. 21, 1939, in respect of the property comprised in the deeds of voluntary settlement and family arrangement dated Nov. 18, 1921, and Nov. 11, 1922, respectively. By the deed of voluntary settlement, it was declared that the trustee should hold the trust fund upon trust to pay the income therefrom, *inter alia*, to certain of his sisters and nephews. By the deed of family arrangement made between the deceased and the beneficiaries under the deed of voluntary settlement, after recitals of the deed of voluntary settlement, of a pooling agreement between the deceased and his deceased brother, Harrison Benn, under which there was due from the deceased to the estate of his brother a sum estimated not to exceed $300,000 with interest at the rate of 2½ per cent. per annum from Oct. 1, 1921, until payment, and of the particulars of the securities then representing the trust fund, there was further recited a statement by the deceased that he had declared the trusts of the voluntary settlement in forgetfulness of the existence of the pooling agreement and of his liabilities thereunder, and in the belief that he would have power to vary as he should think fit the trusts contained in the settlement. The deed of family arrangement then went on to provide, *inter alia*, that, in lieu of the trusts declared by the deed of voluntary settlement, the trustee should hold the trust funds and the income thereof upon trust (i) to raise such sum, not exceeding $300,000, as should be necessary for meeting the outstanding obligations of the deceased to the estate of his deceased brother under the pooling agreement and to pay such sum to the legal personal representatives of the deceased brother in discharge of the debt, and (ii) subject thereto upon trust to pay the income of the trust fund to the deceased during his life. It was further provided that, subject to the preceding provisions, from and after the death of the deceased, the trustees should hold the capital and future income of the trust funds upon the trusts declared by the voluntary settlement, so far as the same should then be subsisting and capable of taking effect, except that the amounts payable to certain of the deceased's sisters and nephews were varied. There was a further provision that the deed of family arrangement should be read as one with the deed of voluntary settlement. The deceased died on Aug. 21, 1939, having waived his right under the deed of arrangement to have a sum not exceeding $300,000 raised out of the trust funds for meeting his obligations to his deceased brother's estate. Upon the death of the deceased, the Revenue claimed that estate duty became payable in respect of the principal value of the trust funds subject to the trusts of the deeds of voluntary settlement and family arrangement either as settled property passing on the death of the deceased within the meaning of the Finance Act, 1894, s. 1, or, in the alternative, as property deemed to pass on his death by virtue of sect. 2 (1) (*c*), as being property taken under a gift made by the deceased of which *bona fide* possession and enjoyment were not assumed by the donees immediately upon the gift, or at all, or, if so assumed, were not thenceforward retained to the exclusion of the donor or of any benefit to him by contract or otherwise within the meaning of the Customs and Inland Revenue Act, 1889, s. 11 (1).

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *J. H. Stamp* for the informant.

J. Norman Daynes, K.C., and *P. B. Showan* for the defendants.

LAWRENCE, J.: This is an information by the Crown claiming estate duty on property passing on the death of W. H. Benn on Aug. 21, 1939. Benn, who was a rich man, financially interested *inter alia* in an American company, Joseph Benn & Sons, Inc., made an irrevocable voluntary settlement on Nov. 18, 1921, whereby certain shares in this company were transferred to a trustee upon trust to pay an annuity of £5,000 per annum to Susannah Benn, a sister, to pay an annuity of £200 per annum to the trustee, and to divide the residue in fourth shares among two other sisters and two nephews, and, on the death of those sisters, to hold the remainder upon trust for the two nephews in equal shares. Benn had been advised that the settlement must be irrevocable if it was to escape tax in the United States of America.

On Aug. 28, 1922, the trustee sold the trust property to an English company, the Ormond Investment Co., in return for shares and debentures in that company. Benn then apparently recollected that he was under a liability to a deceased brother's estate in a large sum of money, and was also dissatisfied with the voluntary settlement on the ground that it was irrevocable, and accordingly took English counsel's opinion as to how he could vary or get rid of the settlement. Counsel advised as follows:

> None of the parties are, of course, compellable to enter into the proposed fresh arrangement, and I do not think that they should be asked to do so, except after they have been supplied with copies of the relevant documents and with a full statement of the relevant facts. On the basis that the parties, or some of them, are not willing to agree to the fresh arrangement, it is necessary to consider what Mr. W. H. Benn's position is. The facts relied upon by Mr. W. H. Benn are, first, that, in his understanding, it remained open to him to alter the settlement at a future date and, second. that the settlement was made in forgetfulness of the obligations to which he was subject under the pooling agreement arising out of the shares which were settled. It appears to me that, if these facts entitle Mr. W. H. Benn to relief at all, they entitle him not to have the settlement rectified, but to have it set aside in its entirety. It appears to me that the court might well come to the conclusion that a mistake on these two matters was a mistake as to fundamental facts, entitling Mr. W. H. Benn to have the document set aside. It is, of course, impossible to advise dogmatically on the point, as everything depends upon the view which would be taken by the court of Mr. W. H. Benn's evidence on the relevant matters.

After considerable negotiations, detailed in para. 12 of the defendants' answer, the accuracy of which was not challenged before me, Benn's sisters and nephews agreed to enter into what was called a family arrangement on Nov. 11, 1922, whereby a life interest in the property was transferred to Benn with the right to raise the sum of $300,000 from the trust fund, and annuities of £2,000 per annum were covenanted to be paid by Benn to each of the sisters and nephews, the reversion after Benn's life interest remaining in the sisters and nephews in the proportions specified in the settlement of Nov. 18, 1921. On Dec. 16, 1922, £1,200 stamp duty was claimed by the Crown on this family arrangement as on a conveyance on sale.

In these circumstances, the Crown now claims estate duty under the Finance Act, 1894, s. 1, or, alternatively, under sect. 2 (1) (*c*) of that Act, on the death of Benn in 1939, whilst the defendants contend that no duty is payable by reason of sect. 3 of the Act. Counsel for the Crown contended that the family arrangement was a mere variation of the voluntary settlement, that the withdrawal of Benn's inchoate right of application to the court to set aside the 1921 settlement was not consideration and was not capable of evaluation, that the parties were not at arm's length, that the terms of the family arrangement were not those of bargain and sale, and that it was not a purchase within sect.3.

The main argument of counsel for the Crown was that, if Benn's claim to have the voluntary settlement set aside was good, he was entitled to the whole property, and there was no consideration moving from the beneficiaries. If, on the other hand, his claim was bad, there was no consideration moving from Benn. As Benn's claim was doubtful and cannot now be decided upon, this argument seems to me inconclusive. It was conceded by the Crown, however, that, as stamp duty had been exacted on the amount of the annuities and the $300,000, the case must be treated as falling under sect. 3 (2) as being a purchase for partial consideration.

In my opinion, it is clear upon the undisputed facts that the family arrangement was arrived at as a matter of business, and that,unless Benn had put forward his claim to set aside the settlement of 1921, the beneficiaries would not have agreed to give up their rights under that settlement, retaining merely the reversion and getting the annuities. It is impossible, as it seems to me, to say that full consideration was not given by the beneficiaries, who gave up a life interest and the right to raise $300,000 in return for the rights they acquired in the property which passed on the death of Benn.

The opinion of Lord Loreburn in *Lethbridge* v. *A.-G.* (1), at pp. 22, 24, and *A.-G.* v. *Boden* (2) show that a family arrangement may also be a purchase within sect. 3, and, in my judgment, the deed of 1922 was a purchase within that section. The actual wording of the deed is not in any way inconsistent with the transaction being a bargain and sale, and, although the recitals do not refer in terms to Benn's claim to set aside the deed of 1921, cl. 4 does, and the negotiations detailed in the answer are consistent only with the transaction being a business transaction and not a family arrangement based upon no consideration other than family affection. It is true that it is called a family arrangement, and, if the parties had not been members of one family and if the voluntary settlement of 1921 had not been made, it would no doubt never have come into existence; but, in my opinion, the voluntary settlement of 1921 cannot be ignored. There it was, and *prima facie* the beneficiaries were entitled thereunder to the whole estate. The transaction by which they surrendered those *prima facie* rights is in its essence a business arrangement, because they gave up certain rights of great value in return for other rights of great value, and there is nothing to show that any motive other than a business motive entered into the transaction.

The trustee had actually taken possession of the property and sold it on Aug. 28, 1922, and on Dec. 16, 1922, they were charged stamp duty on the family arrangement as on a conveyance on sale. It is conceded that allowance must be made for the stamp duty paid in 1922, but I do not think it possible for the Crown logically to concede that one part of the deed of 1922 was a bargain and sale and to contend that another part was not. The deed is one and indivisible, and cannot, in my opinion, be divided up so as to support a claim to estate duty as well as stamp duty. Counsel for the Crown raised a further contention that the case fell within sect. 2 (1) (*c*), on the ground that, by the contract contained in the deed of 1922, Benn was not entirely excluded from the property which he had given to the beneficiaries in the voluntary settlement of 1921. In my opinion, this point is unsound, since the section must, I think, refer to a contract made at the time of the gift. The information will be dismissed with costs.

Information dismissed with costs. The duty, which had been paid, to be repaid with interest at 3 *per cent.*

Solicitors: *Solicitor of Inland Revenue* (for the informant); *S. F. Miller, Mathews & Co.* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

GORDON HILL TRUST, LTD. *v.* SEGALL.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Stable, J.), **May 14, 15, 16, 1941.**]

A *Sale of Land—Negotiations for sale of property—Proposed vendor owner in equity under contract to purchase—Proposed vendor unable to complete—Claim by proposed purchaser for damages for fraud—Right of person having firm contract to purchase to offer property for sale as owner.*

B On Mar. 27, 1936, the appellant contracted to purchase certain premises used as a school. Clause 6 of the contract provided as follows: "The vendors will make all reasonable endeavours to find suitable accommodation for the pupils of the Convent of Our Lady's High School, for which the hereditaments hereinbefore described are used, but vacant possession of the premises will not be given, and completion of the purchase will not take place until such other accommodation C is found. In the event of the completion of the purchase being delayed for a period of more than two years from the date hereof on account of the inability of the trustees of the convent to find suitable accommodation for its pupils, then the purchaser will be entitled to rescind this contract and be discharged from all liability hereunder." The appellant subsequently placed the property in the hands of agents for sale, and on Mar. 28, 1938 (that is, after the expiration of the two D years mentioned in the above clause), the respondents commenced negotiations for its purchase by them. The appellant's vendors were unable to find other suitable accommodation, and, on the respondents becoming aware of the circumstances, they commenced proceedings against the appellant for damages for fraudulent misrepresentation, on the grounds that he had allowed himself to be described as owner E of the property and that they had been thereby induced to incur expense:—

HELD: (i) there was no evidence that the appellant had expressly authorised the making of a false statement.

F (ii) as the appellant had a valid contract to purchase the property, he was in fact the owner of it in equity, and entitled to describe himself as owner.

[**EDITORIAL NOTE.** It is well understood that, although a contract to sell and convey land is worded as a contract to convey to the purchaser, the vendor is always bound to convey as the purchaser may direct. Before completion a pur-G chaser often sells to a sub-purchaser, and the vendor is bound to convey to the sub-purchaser. It is also clear that, from the date of the contract, the purchaser is the owner in equity. The peculiarity in the present case is that the contract for sale was subject to a condition that completion was not to be had until the vendors had secured alternative accommodation, and, after the expiration of two years, the purchaser, if completion had not then taken place, was entitled to rescind. H It was argued that this special condition, at any rate after the expiration of the two years, placed the purchaser in a different position and that he was not then entitled to negotiate a sub-sale. This argument is rejected by the Court of Appeal, although it had been accepted in the court below.

AS TO POSITION OF PURCHASER OF LAND, see HALSBURY, Hailsham Edn., Vol. 29, pp. 337, 338, para. 456; and FOR CASES, see DIGEST, Vol. 40, pp. 179-182, Nos. 1492-1514.]

Cases referred to:

(1) *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358; 1 Digest 589, *2255*; 9 L.J.Ex. 297.
(2) *Richardson* v. *Silvester* (1873), L.R. 9 Q.B. 34; 35 Digest 36, *284*; 43 L.J.Q.B. 1; 29 L.T. 395.
(3) *Ajello* v. *Worsley*, [1898] 1 Ch. 274; 35 Digest 59, *547*; 67 L.J.Ch. 172; 77 L.T. 783.
(4) *Coaks* v. *Boswell* (1886), 11 App. Cas. 232; 35 Digest 20, *115*; 55 L.J.Ch. A 761; 55 L.T. 32; *revsg.* (1884), 27 Ch.D. 424; *subsequent proceedings sub. nom. Boswell* v. *Coaks* (*No. 2*) (1894), 86 L.T. 365, n.
(5) *Derry* v. *Peek* (1889), 14 App. Cas. 337; 35 Digest 27, *185*; 58 L.J.Ch. 864; 61 L.T. 265; *revsg.* (1887), 37 Ch.D. 541.
(6) *Paine* v. *Meller* (1801), 6 Ves. 349; 40 Digest, 189, *1576*.
(7) *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321; 40 Digest 180, *1497*; 42 L.J. Ch. 49; B 27 L.T. 281.
(8) *Lysaght* v. *Edwards* (1876), 2 Ch.D. 499; 40 Digest 182, *1518*; 45 L.J. Ch. 554; 34 L.T. 787.

APPEAL by the defendant from a judgment of WROTTESLEY, J., dated Jan. 28, 1941. The facts are fully set out in the judgment of LUXMOORE, C L.J.

The following extract from the judgment of WROTTESLEY, J., shows the reasons for his decision.

D

WROTTESLEY, J.: The claim is in form an action for deceit, and, in my judgment, the facts are sufficient to support such an action, for the defendant, by his conduct and his statements and implications in the letters which he authorised his agents to write, was guilty of fraud. He deliberately led the plaintiffs to believe what he knew to be untrue E for his own purposes. Though it is not essential that there should be such a motive, those purposes were purposes of gain to himself. It was to keep the plaintiffs in negotiation when, had they known the truth, they would not have remained in negotiation, and they would not have entered into that agreement which, in so far as it is expressed, is in the F letters.

For their part, the plaintiffs believed what the defendant intended them to believe, namely, that the defendant was at the time in a position to convey the property to the plaintiffs, and as a result they continued to negotiate and expend moneys which, had they known the truth, they G would not have done.

If authority be needed to show that such a course of action is deceit in law, if proved, it is to be found in *Richardson* v. *Silvester* (2), at p. 36—a case with a very similar set of facts and a decision of a court consisting of BLACKBURN, QUAIN and ARCHIBALD, JJ.,—I suppose everybody would H agree a strong team of Common Law judges. It is a case which is mentioned with obvious approval by STIRLING, J., in *Ajello* v. *Worsley* (3), at p. 280.

The defendant claims that the plaintiffs struck too soon—that is a phrase used by the defendant's own counsel; that is to say the defendant claims that, by using the phrase "subject to contract" in offering the property at the price of £12,500 as he did, and adding, "completion in six months," he is not answerable for anything which is not true which he said or caused to be said to the plaintiffs in the course of the negotiations concerning the things to be sold, always provided that no contract has in fact been signed, executed and entered into containing such a misstatement as its basis or as a relevant part of it. If that be the law, then the defendant was at liberty to tell any lie he liked to the plaintiffs in the course of the negotiations, with a view to keeping them in negotiation, so long as he stopped short of contracting to sell on the basis of such a lie; and the defendant's counsel was fain to admit that this was a proposition for which he must contend.

Now it must, I think, be conceded that for a man to tell a lie to another is only a tort committed against that other in those cases where the defendant has a duty to the plaintiff to tell the truth, or, at any rate, perhaps more accurately, where he has a duty not to lie; and therefore the question arises whether the circumstances here constitute such a case. I have no doubt that they do, as the judges in *Richardson* v. *Silvester* (2) had no doubt. Moreover, the defendant's conduct and statements made vicariously through his agents fall, as I think, precisely within the boundaries laid down in numerous cases culminating in *Derry* v. *Peek* (5).

It is suggested that the statements were true, because the defendant was technically the owner of the property having regard to such cases as *Paine* v. *Meller* (6), *Shaw* v. *Foster* (7) and *Lysaght* v. *Edwards* (8).

As regards *Paine* v. *Meller* (6), it is to be noted that LORD ELDON said in terms, in an introduction to the passage which was cited to me, that that was a case of the sale and purchase of land on the usual terms. No one could suggest that the contract made between the defendant and the Mother Superior here was for the purchase and sale of land on the usual terms; it was in every respect quite exceptional. In *Paine* v. *Meller* (6), as LORD ELDON points out, the defendant could sell the land. He could in fact give a perfectly good title to it. In this case all that the defendant could really sell was his interest in the contract—his chance of getting the land; and in that connection it is not uninteresting to note that in a document which appears to have very little relevance to this inquiry at all, namely, a charge by the defendant to the solicitors on the record for costs, and purporting to be a substituted security, it is described as "a sale of our joint and several interest in a contract for the purchase," and is so described, not once, but twice, in the charge.

Then it was said that certain passages used by LORD CHELMSFORD in *Shaw* v. *Foster* (7) were in defendant's favour in this respect, and particularly the introductory passage in the opinion of LORD CHELMSFORD:

> According to the well-known rule in equity, when the contract for sale was signed by the parties, Sir William Foster [the vendor] became a trustee of the estate for Pooley [the purchaser] and Pooley, a trustee of the purchase money for Sir William Foster.

Further, the defendant appears to rely on a passage to be found at p. 338, where Lord Chelmsford said :

> My Lords, in that state of things Mr. Pooley, the purchaser, being the real and beneficial owner, I apprehend that there cannot be any doubt of the rights of Mr. Pooley with regard to the property of which he had thus become the beneficial owner. He had a right to devise it ; he had a right to alienate it ; he had a right to charge it. There are various ways that might be suggested in which, for valuable consideration, he might have created a charge more or less affecting the property. I apprehend that he might have contracted, for valuable consideration, with any person to whom he was indebted, that he (Pooley) would complete the purchase, and that when the purchase was completed and the property assigned to him, he would then make it over to the person to whom he was thus indebted. That would have been one way of dealing with his interest. Another way might have been this. He might have contracted with any person to whom he was indebted that he would pay the purchase-money remaining unpaid, and that then, the purchase-money being thus paid, and the time for the assignment having arrived, he would authorise and require the vendor to assign, not to him, Pooley, but to the person to whom he was indebted. A third and a simpler way in which he might have affected his interest would have been to contract with anyone to whom he was indebted to assign to him the contract which he had entered into in whole, making the person to whom he was indebted assignee of the contract.

That case is again a case of a person who has bought an estate in the ordinary way. One party entered into a contract with the other to sell leasehold property to the latter, and there was no question there of a condition subsequent or a condition as to which there was any doubt whether it could, in due course, be fulfilled. If the defendant here had chosen to adopt one of the courses recommended by Lord Chelmsford and had assigned the benefit of his contract, there could not have been a word of complaint ; but he never did so.

Finally, there is *Lysaght* v. *Edwards* (8), in which counsel for the defendant appeared to rely upon an observation by Sir George Jessel, M.R., at p. 506. That again was the ordinary case of a contract for the purchase and sale of real estate. Sir George Jessel, M.R., quotes the settled doctrine of the court as follows :

> . . . the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

Those are all what I may call ordinary cases of clean contracts for the purchase and sale of land ; they bear no resemblance to the facts of this case, and the real fact of the matter is that each case of this kind must be judged on its own facts. It may well be that a man who is only an owner in equity may call himself " owner " in course of negotiations without laying himself open to anything in the shape of an action for deceit or fraud. Generally speaking, this would be the case ; but I can imagine cases where it would not be true and would be misleading and might form the subject of an action for deceit. I can conceive of such cases. In this case anyhow, it was not true that the defendant was the owner simply. In certain circumstances he had the right to become the owner—a very different state of affairs.

I will not turn aside in this case to consider whether the court (or the

Court of Chancery) would or would not have granted to the defendant a decree for specific performance. The test I have to apply is this: whether the defendant, by what he did and said, deliberately created in the plaintiff's mind a false impression as to the facts of the defendant's rights. I find that he did.

Only one other matter, I think, has to be dealt with, that is the claim by the defendant that whatever he did, whatever lie he may have told, he is not liable in an action for deceit by reason of the provisions of the Law of Property Act, 1925, s. 198 (1). That section provides as follows:

> The registration of any instrument or matter under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, in any register kept at the land registry or elsewhere, shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date and so long as the registration continues in force.

It is the fact that the defendant, on Dec. 8, 1937, caused his contract with the Mother Superior, giving him that conditional right to have the land conveyed to him, to be registered at the appropriate registry and, says the defendant, "Therefore those words are plain enough, and it does not matter what lie I told, because the Act of Parliament provides that they (the plaintiffs) had actual notice of this contract. How, then, can they claim to have been deceived?"

In my judgment that section cannot be used to afford a shield against an action for fraud. It has to be borne in mind that all that would appear upon the register would be a notice that there was an agreement in favour of the defendant. If, therefore, the plaintiffs had chosen to verify the defendant's statement by searching at the Land Registry, they would have found something which would have encouraged rather than discouraged them from going on with the negotiations. Indeed, it now appears that this part of the case is put in this way by the defendant, that it is their duty, having been told definitely by Mr. Segall, the defendant, that he was the owner, not to believe that, but to search the register. It is now admitted that they would not have been allowed to see it, but, says the defendant, they could have asked for permission to search the register and no doubt permission would have been given to them to search. They would then have discovered that there was a contract, they would have gone back and they would have pursued their inquiries by appropriate correspondence, and in the end the defendant would have shown them that contract, and, when they had seen the contract, they would have seen exactly what the state of affairs was. That is seriously put forward, I gather, as an answer to this action for fraud.

It is quite clear that that section has nothing to do with cases of this kind, and, although it is not necessary for me to decide this, it seems to me that that section is really aimed at protecting the persons who enter into agreements. It may well be that, before the money was paid and before the conveyance was executed, there would have been a duty upon the plaintiffs in this case to search the register and to make themselves acquainted with the contents of that agreement which was registered there. It is perfectly clear to me, beyond any doubt whatever, that that section was never intended to be used as a shield of defence by a person who chooses to call himself an owner when he is not.

Wrottesley, J., then gave judgment for the plaintiffs for £23 18s., with costs on the High Court scale. From this judgment the defendant appealed to the Court of Appeal.

W. P. Spens, K.C., and *A. W. Elkin* for the appellant.

N. L. C. Macaskie, K.C., and *S. Seuffert* for the respondents.

Spens, K.C.: There was no evidence upon which the judge could come to the conclusion that the appellant had ever described himself or authorised himself to be described as owner of the property in question with the intent to deceive anybody. Further, if he had authorised himself to be so described, and was in fact described as owner of the property, it was a proper description, because he had a contract for the purchase of the property. The action against the appellant cannot properly lie, because there has been no contract with the respondents, and the appellant could have given the company notice terminating the negotiations. If, in the circumstances, the respondents had incurred any expense, it was at their own risk and any damage cannot be due to any misrepresentation by the appellant. The word " owner " is properly applied to any person who has a right to put property into the hands of another for sale. The contract which the appellant had with his vendors was a firm contract for the sale and purchase of the premises. Having regard to condition 6 of that contract, the judge said that the appellant ought not to have allowed himself to be described as owner. That condition, however, could have been waived by the vendors at any time. I am not disputing the authority of *Richardson* v. *Silvester* (2). Of course, if, in the course of negotiations, a man says something which is deliberately untrue, and the other party suffers damage in consequence, that party is entitled to damages for deceit. In *Ajello* v. *Worsley* (3), it was held that, if a person has the usual expectation of being able to acquire goods from other dealers, there is nothing to prevent his advertising that he has those goods for sale. If he acts reasonably and honestly, there is no fraudulent representation at all. The authority is universal that a person who has a contract for the purchase of land, which contract can be enforced against him and which he can enforce, is the owner in equity. [Counsel referred to Williams on Vendor and Purchaser, 4th Edn., Vol. 2, p. 808.]

Macaskie, K.C. : A man is making a representation which is false in fact if he represents himself to be the owner of property and negotiates the sale of that property to another and conceals from the intending purchaser that the possibility of his ever being able to complete the proposed sale is extremely remote, particularly where that remote possibility depends upon the volition of a third person. There may be a variety of owners, with a varying condition of ownership, but a point is reached where a man is not entitled to call himself the owner able to give possession if the fact of his being able to give completion is no longer reasonably possible, and if, in fact, his chance of doing so has reached vanishing point. The period of two years which the convent authorities had in which to find other suitable accommodation had passed by, and other suitable accommodation had not been found by them. *Coaks* v. *Boswell* (4), shows that information must be given on all relevant matters, whether or not it is asked for. The respondents complain of misrepresentation, and complain that the statement was made recklessly, without the appellant caring whether it was true or false, to use the words of Lord Herschell in *Derry* v. *Peek* (5). Many people have been found guilty of deceit without their having had any apparent motive. When a principal employs an agent to sell a property, either freehold or leasehold, and describes himself as the owner of it, and authorises the agent to offer the property for sale with possession in 6 months or thereabouts, without pointing out that, by the peculiar terms of the contract under which he was a purchaser from some third party, completion has not taken place, and the facts show that there is no chance of completion taking place by the time fixed, the principal is making a representation which is false to his knowledge, or he is making a representation recklessly, without caring whether it be true or false, to induce a purchaser to enter into a contract with him.

MacKinnon, L.J.: Luxmoore, L.J., will deliver the first judgment.

Luxmoore, L.J.: This is an appeal from an order made by Wrottesley, J., on Jan. 28, 1941. The order was made in an action for damages for deceit brought by Gordon Hill Trust, Ltd., against one Mark Segall. Para. 1 of the amended statement of claim describes the alleged deceit as follows:

> . . . the defendant falsely and fraudulently represented to the plaintiffs that he or a company with which he was associated was the owner of certain land and premises situate thereon and known as 12, 14 and 16 Amhurst Park.

The allegation is that the representations complained of were contained in (*a*) certain letters written by a firm of estate agents who carried on business at Amhurst Parade under the style of Cravens, and that they were acting as agents for the defendants, and that those letters passed between them between Apr. 6, 1938, and May 27, 1938, and (*b*) certain letters by Herbert Baron & Co., solicitors and agents for the defendant to the firm of Harringtons, between May 26, 1938, and June 22, 1938. Para. 2 says that these representations were made in order to induce the plaintiffs to enter into an agreement with the defendant for the purchase of the land and premises. This is a somewhat remarkable allegation, for it is plain that, if the defendant had no title to the houses in question, he could not hope to obtain any benefit from entering into a contract, which must of necessity make him liable for damages which might be very substantial, for obviously in such a case damages would include damages for loss of bargain. Para. 3 says that, on the faith of the representations, the plaintiffs negotiated with the defendant and incurred legal and other expenses. Para. 4 alleges that, on or about June 29, 1938, the plaintiffs became aware that neither the defendant nor any company with which he was associated was the owner of the houses, but that in fact the land was owned by the trustees and owners of the Convent of Our Lady's High School, Amhurst Park, and that thereupon the plaintiffs determined all negotiations with them. Para. 5 alleges a loss of profit, and gives particulars of special damages. The prayer claims special damage of £23 18*s.* plus £70, which is described in the particulars as "Estimated loss of business full particulars of which will be given on discovery." I think that the loss of business which was claimed as special damage was that they might usefully have occupied their time in negotiating for something else. There was also a claim for general damages.

The judge held that the representation that the defendant was the owner of the property was made, but it is to be observed that he did not find that the representations relied on were made by the defendant personally to anyone, nor, indeed, did he mention any date on which the representation was made by Cravens as agents for the defendant. He stated in quite general terms that the false representation that the defendant was the owner of the property in question was made by the defendant, or was caused to be made by him, and he held that such representation was false and fraudulent to the knowledge of the defendant —not, be it noted, to the knowledge of Cravens—and that the defendant was, therefore, liable to the plaintiffs in damages. He has fixed those damages at £23 18*s.*, which is the first item of special damage mentioned in the statement of claim. The second item of special damage was withdrawn at the hearing, and the judge refused to allow anything under the head of general damages. Having fixed the damages at £23 18*s.*, he awarded the plaintiffs costs on the High Court scale. The defendant has appealed from this judgment. He says that he made no representations to the plaintiffs personally, for he never saw them, that the estate agents did not make any representation with his authority, and that there is no evidence of this fact to support the finding that they did so. He further says that, if the representation was made, either by himself or by his agents, it was not false, for he, or the company which he represented, was in fact the owner in equity of the three houses, Nos. 12, 14 and 16 Amhurst Park. He also says that the representation was not false to the knowledge of the agents.

Before considering the evidence, or want of evidence, and the legal question involved, it is necessary, I think, to refer to the previous history in order to show what interest the defendant, or the company to which reference has been made and of which he was a director, had in Nos. 12, 14 and 16 Amhurst Park. On Mar. 27, 1936, and I think for some considerable number of years before that date, the three houses belonged to a body which was referred to in the case as the trustees and owners of the Convent of Our Lady's High School at Amhurst Park. This body carried on upon the premises in question a school for girls. On Mar. 27, 1936, the defendant entered into a contract with the trustees and owners of the convent, the contract being signed on behalf of the trustees of the convent by one M. A. Britten, who was described as the Mother Superior of the Convent. The contract is described by the judge as being of a very unusual nature. It is a contract for the sale and purchase of the premises Nos. 12, 14 and 16 Amhurst Park, at the price of £8,500, with a provision that a deposit of 10 per cent. shall be paid. Clause 3 of the contract provides as follows:

> The purchasers will be released from this contract and will be discharged from all liability in respect thereto and the deposit paid hereunder will be returned to them if on the investigation of the title of the vendors, it is discovered that the property hereinbefore described is subject to restrictions and stipulations which will prevent the purchasers erecting any buildings on the site of the said hereditaments for any purpose they may desire.

That clause is not really unusual, for it only states what would plainly be the plaintiffs' right if the clause had been omitted from the contract and the property was not expressed to be subject to any such stipulation or restriction. Then cl. 4, which is of a special nature, provides as follows:

> The purchasers will likewise be released from the contract if any plans for the erection of buildings or flats which they submit for approval to the London County Council, or the appropriate local authority, are not passed or approved, or are modified.

Then cl. 5 provides for the completion of the purchase, but the dates are left blank, and, as no date is in fact fixed, completion must take place within a reasonable time, having regard to the provisions of the contract, and it is expressly stated that vacant possession shall be given on completion "subject to cl. 6 hereof." Clause 6 provides as follows:

> The vendors will make all reasonable endeavours to find suitable accommodation for the pupils of the Convent of Our Lady's High School, for which the hereditaments hereinbefore described are used, but vacant possession of the premises will not be given, and completion of the purchase will not take place until such other accommodation is found. In the event of the completion of the purchase being delayed for a period of more than two years from the date hereof [before Mar. 27, 1938] on account of the inability of the trustees of the convent to find suitable accommodation for its pupils, then the purchasers will be entitled to rescind this contract and be discharged from all liability hereunder.

Then the contract is made subject to the General Conditions of Sale of the Law Society, or such of them as may be applicable to a sale by private treaty.

Clause 6, which I have just read, excuses the vendors from completing the purchase until they have made all reasonable endeavours to find suitable accommodation and those reasonable endeavours have been successful, but, since completion is not to take place until the suitable accommodation is found, the defendant cannot insist on completion until such accommodation as is described is in fact found, provided, of course, that the vendors have made every reasonable effort to find that accommodation. If, for instance, they make no attempt at all to find such accommodation, the clause will afford no protection to the vendors in an action for specific performance. It was contemplated that the finding of suitable accommodation might take some time, and, therefore, it was provided by cl. 6 that the defendant should have the right to rescind the contract at the end of two years, if accommodation had not then been found.

As a result of entering into that contract, the defendant, and through him the company of which he was a director, became the owner in equity of the property, certainly as from the date of the contract, for the vendors were precluded from dealing with that property in any way except with the consent of the defendant or the company. The defendant was no doubt anxious to get the property, and from time to time he tried to assist the vendors in their search for other suitable premises, although he was under no legal liability so to do, and there is some evidence that the vendors themselves were making some efforts in the same direction on their own behalf, but it does not appear precisely to what extent they were diligent in the matter. As a matter of fact, on May 19, 1938, the defendant brought an action for specific performance against the Mother Superior and the trustees and owners of the convent. I think it could hardly be suggested that the appellant started that action knowing that he had no real hope of obtaining such an order. However, this is a divergence from the chronological order of events, for on Mar. 28, 1938, when the period of two years mentioned in cl. 6 of the contract had expired and the defendant was entitled to be released from his contract to purchase if he so desired, one Harrington Edwards (who is one of the directors of the plaintiff company, and also a member of the firm of solicitors acting for it) called at the offices of Messrs. Cravens, the estate agents, to whom I have already referred, in order to ascertain if they had on their books any sites suitable for the erection of a block or blocks of flats, and Messrs. Cravens gave him a list which included Nos. 12, 14 and 16 Amhurst Park. It does not appear that any statement was then made as to the ownership of the property, nor was any question asked about this point. There was no subsequent interview, the rest of the negotiations being carried on by correspondence, to which our attention has been called.

It appears from the correspondence that the first reference to ownership was made by Messrs. Cravens on Apr. 28, 1938, for on that date Messrs. Cravens wrote to Harrington Edwards as follows :

> We now have pleasure in enclosing herewith rough plan of the above [Nos. 12, 14 and 16, Amhurst Park, and No. 10 Amhurst Park] and since writing you yesterday we have had an opportunity of interviewing one of the directors of the company who own this property, and whilst he cannot give any definite decision he states that the price required is £12,500, but if a definite offer of £12,000 is submitted same will probably receive favourable consideration for Nos. 12, 14 and 16 only. He further states that should a contract be entered into he has no objection to 5 per cent. deposit being paid instead of the usual 10 per cent., and this property is offered subject to contract.

The correspondence continued, and on May 10, 1938, Messrs. Cravens wrote as follows :

> Further to our letter of the 5th inst., we have to-day interviewed our client,

> Mr. M. Segall, who together with his co-directors states that the lowest price that can be accepted for the above freehold properties is £12,500 subject to contract and possession to be given within 6 months . . .

Then they asked them to communicate "direct with our client's solicitors who we understand are Messrs. Herbert Baron & Co." On May 12, the plaintiffs' solicitors wrote as follows:

> We have now taken our clients' instructions upon your letter of the 10th inst., and we are pleased to say they have instructed us to agree to the terms set out therein. We presume we shall hear from Messrs. Herbert Baron & Co. in due course.

The correspondence continued, and on June 2 a draft contract was sent by Messrs. Herbert Baron & Co. to Messrs. Harringtons. That draft contract does not bear any date. It is expressed to be made between Mark Segall (the vendor) and the plaintiff company (the purchaser), and it provides for the purchase of the property for £12,500, a deposit of £625 being made, and it is said to be subject to the restrictive covenants set out in the schedule. There is a reference to the registered title, and there is a provision that the purchase shall be completed in the usual way on Dec. 31, 1938. Then there is this clause:

> In all other respects this sale shall be governed by the conditions known as the National Conditions of Sale (13th Ed.) so far as the latter conditions are not inconsistent.

Then they set out certain restrictive covenants which prevent the property from being used otherwise than as private dwellings. When those restrictions were disclosed, the plaintiffs' advisers were obviously concerned about the matter, and the correspondence which ensued shows that the main question taken up was the existence of these restrictive covenants. Suggestions were made that they were no longer effective. It was stated that Segall was ready to offer his services in obtaining the removal of these restrictions, and on June 17 Messrs. Cravens wrote to that effect. On June 29, Messrs. Harringtons, the plaintiffs' solicitors, wrote to the defendant's solicitors saying that they had seen their clients, had made some inquiries, and had ascertained:

> . . . that your client has represented himself to be the owner of this property, without any right whatsoever, and our clients have suffered considerable damage by such representation. It appears to us—unless there is some mistake in the information our clients have obtained—that it is extraordinary when this question of restrictions arose, which enabled our clients to ascertain the facts, you did not call our attention to the circumstances. Our clients take a most serious view of the matter and have asked us to lay the facts before counsel with a view to claiming damages against your clients.

Then on the same day they wrote to Messrs. Cravens as follows:

> We are surprised that we were not informed by you, if you knew the fact, that Mr. Segall was not the owner of the property and had no justification whatsoever in holding himself out as such owner.

Then a writ was issued in this action on July 13, 1938.

In order to succeed, the plaintiffs must prove that some false representation was made. Plainly, there was no direct representation by Segall to Harrington Edwards, and the only representation possible was by Messrs. Cravens. To succeed against the defendant for false representation made by an agent, it is well-settled that the plaintiff must prove that, as is said in Williams on Vendor and Purchaser, 4th Edn., p. 808:

> . . . it was untrue or reckless to the knowledge of the principal and was expressly authorised by him; or if it was untrue or reckless to the knowledge of the agent (though not the principal) [it] was made either with the principal's express authority or without such authority within the scope of the agent's employment. But if the principal was aware of the untruth or recklessness of the statement, and the agent was not, and the representation was made by the agent without fraud and in the honest belief that it was true, and without the express authority of the principal but within the scope of the agent's employment, it appears that, in order to charge the principal in an action of deceit, the party misled must prove some conduct positively fraudulent on the part of the principal; as, for instance, that the principal being aware of the agent's ignorance of the true state of facts, purposely employed him to transact the business with the object of avoiding any discovery which would or might be made by inquiries put to the principal himself. Such conduct would, it is considered, amount to the active concealment by the principal, for which he would be personally liable.

That statement is a correct summary of the law as stated in *Cornfoot* v. *Fowke* (1).

I will assume for a moment that the statement of Segall, or the company of which he was a director, was in fact false. I am unable to find any evidence that Segall expressly authorised Messrs. Cravens to make such a false statement. He denied that he gave any such authority, and, although the judge thought him an unsatisfactory witness, the mere denial by an untruthful witness does not in such a case establish the contrary. No one was called from Messrs. Cravens, and obviously, so far as the correspondence goes, Messrs. Cravens thought Segall, and through him the company of which he was a director, owned the property. If there is any doubt about it, it is made quite clear by the letter which they wrote to Messrs. Harringtons on July 1, in which they said that the letter received from Messrs. Harringtons on June 29, which I have already read:

> . . . came as a great surprise to us and we wish to emphasise the fact that at no time were we aware that Mr. Segall was not the owner of the above property, and further we are not associated with Mr. Segall, his co-directors or any company in which he may be interested other than as his agents for the sale of this property.

Assuming that the statement was false, I find it impossible to hold that the requirements of law with regard to the liability of the principal for a misrepresentation by the agent as laid down in *Cornfoot* v. *Fowke* (1) had been fulfilled. However, the matter does not end there, for, if the representation was not in fact false, no liability can arise. The contract between Segall and the convent was not subject to any condition so long as it remained on foot, and, in my judgment, it was not untrue to refer to Segall or his company as the owner or owners of the land. The circumstances at least show that they thought that the contract entitled them to compel the vendors to complete the contract when they started the action for its specific performance on May 19, 1938. It is not pleaded, at any rate, that this action for specific performance was either some part of a deep-laid scheme to assist them in their negotiations with the plaintiffs (which, if they had resulted in a contract, as I have already said, when they had no contract, would have landed Segall and his company in an action for damages, without any possibility of compelling specific performance of the contract with the plaintiffs) or part of some scheme by which they were to obtain, in an action for specific performance, damages against the convent for loss of bargain. No such suggestion appears in the pleadings.

When one considers the judgment of the judge in this matter, it seems to me to be plain that he has attributed to Segall's actions something which is really contrary to any business sense of the matter. That Segall should seek to enter into a contract if he had no interest in the property at all seems to me to be the conduct of a person who could hardly be described as of sound mind, for, if he knew he had no title, he would, if he entered into a contract, obviously make himself liable in damages, which would be substantial, and he could get no benefit from it at all. If it is suggested that this was part of some deep-laid scheme to prove damages against the convent, and that he knew that he had no claim against the convent for specific performance, or no hope of getting damages, it would again have been an extraordinary proceeding. It would have been still more extraordinary if that had been his object, and, when he had obtained the evidence by having got the offer, he had gone on to enter into a contract, or to have a draft contract prepared, which would certainly involve him in expense, to make offers to get restrictions removed and so on. It is quite true that the judge said that he did not think that Segall was a satisfactory witness, but, when one has a series of actions which can properly be explained as being in the ordinary course of business, and the only alternative is that, if they are not in the ordinary course of business, Segall appears to have been going out of his way to incur liabilities which might certainly have been heavy, the finding that he made a false representation in order to induce negotiations is indeed hard to understand. Segall's actions, including the action which he brought for specific performance, are really explicable on the one ground only, and that is that he thought that he or his company had become in equity owners of the property when they entered into the contract in question. In that belief it seems to me that he was well-founded, because, as I read the contract and the cases which have been repeatedly relied on, he was in fact the owner of the property, and, that being so, there should never have been any finding that he had made a false and fraudulent representation that he was the owner of the property when he knew full well that he was not entitled so to describe himself.

In the court below, WROTTESLEY, J., appears to have found some authority for the conclusion to which he came in two cases to which he referred in his judgment. The first was *Richardson* v. *Silvester* (2). The headnote in that case, so far as material, is as follows :

> The particulars of the plaintiff's claim, in an action in a county court, were as follows. "The plaintiff sues the defendant in tort for legal fraud and deceit committed under the following circumstances : for that the defendant, in Mar., 1872, caused to be inserted in a public newspaper an advertisement for the letting by tender, with

> immediate possession, of a farm ; and the plaintiff, believing in the *bona fides* of such advertisement, and desiring to become tenant of a place of the description advertised, did take trouble and pains and incurred expense in going to and inspecting the property, and in the employment of persons to inspect and value it for him, with a view of becoming tenant thereof, whereas afterwards it appeared that the defendant had no power to let the property as advertised, and caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement [the purpose of letting.] And that the defendant knew, at the time he caused such advertisement to be published, that he had not the power to let the farm, and that the farm was not to be let." The county court judge ruled that the particulars disclosed no cause of action and non-suited the plaintiff.

The court held as follows :

> . . . the particulars contained allegations amounting to a fraudulent representation for which an action would lie.

That case seems to me to have no bearing whatever on this case. It is quite different from the present case. There the man who advertised knew that he could not grant a lease. He invited all the world to tender, as a result of which he held out that he would grant a lease to the bidder of the highest rent, a thing he was not in a position to do, for he had no power to grant any lease whatever. The plaintiff, on the faith of this representation, incurred expense in journeying to view the property, and he claimed such expense by way of damages. No one would quarrel with that decision, for it is only an example of that class of case where a man tells a lie and a third party acts on that lie to his own detriment, so that the third party is entitled to recover. No one would suggest that in such a case the liar would not be liable. The second case, *Ajello* v. *Worsley* (3), only expresses approval of the decision in *Richardson* v. *Silvester* (2), and it would have been surprising had it been otherwise.

For these reasons, I think that Wrottesley, J., was plainly in error in finding for the plaintiffs in respect of the £23 18*s*., and, consequently, in my judgment, this appeal must be allowed, with costs here and below, and those costs should, in my judgment, be on the High Court scale.

MacKinnon, L.J. : I agree. It might well be that, if the full facts of the defendant's connection with this property had been revealed to the plaintiffs at the beginning, they would have abstained from incurring legal expenses in negotiating with the defendant, but there was no obligation of disclosure of any document on the part of the defendant when he invited the plaintiffs to negotiate with him. It is true that the plaintiffs' cause of action does not allege any such duty of disclosure. Their claim is simply an allegation of fraud, and the fraud suggested is that the defendant described himself as owner of this property, and impliedly thereby alleged that he was in a position to give possession at an early date. So far as I can see, the only evidence that he ever described himself as owner was the fact that he authorised Messrs. Cravens, the agents, to offer the property for sale. At the utmost, that cannot imply more than a representation : "If our negotiations result in a binding contract, I shall be able to give you possession at the date our contract requires." I see no evidence whatever to justify the conclusion that, if he made that limited sort of representation, he then knew that he never would be able to give possession. Indeed, the very fact that he thus negotiated with the plaintiffs seems to me almost conclusive that he did not so act, because to do that could have no possible result other than to render himself liable (i) for damages to the plaintiffs, (ii) for the costs of his solicitors in preparing the draft contract as it was in fact prepared, and perhaps (iii) for damages to Messrs. Cravens for depriving them of commission. In these circumstances, I think that there was no evidence on which the judge could find that there was fraud by the defendant, and that his representation was untrue, or, rather, that there was a fraudulent misrepresentation by the defendant. Therefore, I agree that the appeal should be allowed with costs here and below, and, in the circumstances, the costs must be on the High Court scale.

STABLE, J.: I agree, and have only one observation to add. The vehicles of the fraud pleaded in this case are certain express representations contained in correspondence. There is no allegation in the pleadings of fraud by non-disclosure. Accordingly, it seems to me that this case has no bearing at all on the line of cases where the instrument of fraud was a suppression of the truth. There are cases in which a successful action for fraud has been brought for suppressing the truth or presenting a false picture, or suppressing part of the truth, although there was no duty to disclose. For the reasons given by MACKINNON and LUXMOORE, L.JJ., I think that the appeal succeeds.

Appeal allowed with costs in both courts on the High Court scale.

Solicitors: *Herbert Baron & Co.* (for the appellant); *Harringtons* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

FOAMINOL LABORATORIES, LTD. *v.* BRITISH ARTID PLASTICS, LTD.

[KING'S BENCH DIVISION (Hallett, J.), **May 6, 7, 8, 9, 1941.**]

Damages—Breach of contract—Failure to deliver goods—Goods already advertised—Loss of co-operation of advertisers.

The plaintiffs contemplated putting on the market a summer cream for the use of ladies. This was to be supplied in small but attractive containers suitable for ladies to carry about in their handbags. As part of the advertising campaign in connection with this cream, they secured the co-operation of certain editresses of columns in ladies' papers, who not only wrote a puff of the article but associated themselves with the half-price offer of the cream. The plaintiffs ordered 10,000 of these special containers from the defendants who failed to make any deliveries except some 47 samples. In an action for breach of the contract, the plaintiffs contended that they were entitled to damages for the loss of the future co-operation of the editresses:—

HELD: the plaintiffs were not entitled to include in their damages a claim for that loss, because (i) they had not proved that it was within the contemplation of the parties, (ii) they had not adduced any evidence of pecuniary loss.

[**EDITORIAL NOTE.** The real point in this case is whether the claim was one for damages for loss of reputation. Loss of reputation is a matter for which damages cannot generally be claimed except in actions for defamation. After carefully considering the matter, the judge holds that the claim here put forward might be a good one, but, in the present case, the essential facts supporting such a claim had not been proved. Incidentally he considers generally the damages recoverable where breach of contract has completely frustrated an advertising campaign. A

As to Damages in Contract, see HALSBURY, Hailsham Edn., Vol. 10, p. 121, para. 151; and for Cases, see DIGEST, Vol. 17, pp. 130-135, Nos. 380-412.]

Cases referred to:

(1) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 17 Digest 93, *101*; 23 L.J.Ex. 179; 23 L.T.O.S. 69. B

(2) *Addis* v. *Gramophone Co., Ltd.*, [1909] A.C. 488; 17 Digest 78, *1*; 78 L.J.K.B. 1122; 101 L.T. 466.

(3) *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ltd.*, [1928] 1 K.B. 269; Digest Supp.; 96 L.J.K.B. 980; 138 L.T. 51.

(4) *Groom* v. *Crocker*, [1939] 1 K.B. 194; [1938] 2 All E.R. 394; Digest Supp.; 108 L.J.K.B. 296; 158 L.T. 477.

(5) *Aerial Advertising Co.* v. *Batchelors Peas, Ltd.* (*Manchester*), [1938] 2 All E.R. 788; Digest Supp. C

Action for damages for breach of contract. The facts are fully set out in the judgment.

The plaintiffs were at all material times suppliers of cosmetics to the public, and in Feb., 1940, were contemplating putting on the market a new product called a summer cream. It was part of their plan that this product should be available to the public at Whitsuntide. Further, the plaintiffs proposed to supply this cream in small but attractive containers suitable for ladies to carry about in their handbags, and also in larger glass containers from which the small containers might from time to time be refilled. For the purposes of a sales campaign in connection with this cream the plaintiffs, through their managing director, Goldsbrough, secured the co-operation of certain beauty editresses, who, in addition to including a puff of the new cream, inserted in their columns particulars of a half-price offer. The following is a sample of the offers made: D E F

> So that all of you, my readers, can possess the elegant ivorine handbag containers packed with a generous supply of this wonder cream, I am arranging with the makers for you to receive one at a special bargain price. The container costs 1*s*. 3*d*., but if you post me your name and address, together with 7½*d*. in stamps, it will be sent to you by return. Mark your envelope, which should be sent to me at my address, as below, "Summer Cream," and remember this offer is only open until July 26, 1940. G

In response to this and similar offers some 3,000 orders were received.

For the purpose of this scheme the plaintiffs in Mar., 1940, entered into a contract for the supply of 10,000 of these special containers with the defendants, who were manufacturers of such articles. Samples were to be supplied in Apr., 1940, and, if they were approved, the containers were to be produced at the rate of 3,300 per week. Such containers had to be specially made and could not be bought upon the market. In fact only about 47 samples of these containers were produced. These were not produced till June, 1940, and, although faulty, the plaintiffs requested H that production should be put in hand, as the containers were required immediately.

The contract and the breach of it were admitted.

The action was commenced by a specially indorsed writ and, in proceedings under R.S.C., Ord. 14, the defendants admitted liability for £55, a sum paid by the plaintiffs for the purchase of a special tool for the production of the containers, which the defendants had undertaken would be retained by them and used only in the production of these containers.

B. J. MacKenna for the plaintiffs.

B. Stenham for the defendants.

HALLETT, J.: In the first place, a claim is made for £87 10*s.* in respect of estimated loss of profit. The order was for 10,000 containers, at a cost of 2¼*d.* each. It is said by Goldsbrough, and I believe it, that the cost of the small quantity of cream put up in the containers would be ½*d.*, and various other incidental costs in connection with the packing and preparation of the product for sale would amount to ¼*d.*, making a total cost of 3*d.* for the container when filled and ready for despatch. The containers were going to be used in the first instance in what has been called a half-price offer. The fixed price for these containers with the cream was to be 1*s.* 3*d.*, so that, under the half-price offer, they were to be supplied to the public for 7½*d.* I am told that 1½*d.* would represent the postage, and, therefore, there would be 6*d.* left, out of which 3*d.* would be profit. There is one point which has occurred to me in favour of the defendants and which I think it right to consider and deal with, although it was not raised by their counsel, and it is this. I think that, if sales are effected by means of advertisement and such like, the cost of that advertising falls to be borne by the sellers out of what I may perhaps describe as their gross profits. That is to say, the cost of the article and the cost of any packing entailed and so on are not the only deductions ultimately to be made by them from the selling price in order to see what profit they have made out of their venture. It did occur to me at one time that I ought not to take the figure of 3*d.*, because something ought to come off that figure in respect of the cost of promoting those sales. Inasmuch as, under other items of their claim, the cost of advertisement is sought to be recovered, I did wonder whether, if I gave judgment on the basis of 3*d.*, I should be giving the advertising expenditure, in substance, twice over. On the whole, however, I do not think that it would be fair to make any deduction in favour of the defendants upon that ground, because this advertising expenditure was not intended merely to promote and produce these initial sales. It was an advertising expenditure the cost of which, when the plaintiffs ultimately made up their accounts, would be spread over the total of their sales, and certainly would not be attributed exclusively, or even mainly, to the original sales. There is more force in that comment when one realises that these initial sales were to be sales at half-price, and that advertisement expenditure could be written off out of the higher profit from the subsequent sales.

The next question is as to what quantity of sales I ought to take as the basis of an estimate. It is said that 10,000 containers were ordered, and it is said by Goldsbrough that at least 7,000 would have been sold, but counsel for the defendants pointed out to me that from certain particulars given it appears that the actual number of sales effected before the fiasco became apparent was only about 3,000. The plaintiffs have satisfied me that, but for the fiasco produced by the defendants, the sales would have been more than 3,000. In so far as the sales were not under the half-price offer, but were at the full price, the profit would have been larger. I think, therefore, that, in taking 7,000 as an estimated amount of the sales for the purpose of calculating this item of damage, Goldsbrough, on behalf of the plaintiffs, has really taken a moderate figure. Counsel for the plaintiffs sought to enlarge that figure by way of an amendment, if necessary, and by making a claim for further profits which would have been made if further quantities had been sold. The view I took was that at this stage, and having regard to the form of the pleadings and the particulars which had been delivered, it would not be right to allow any amendment of that kind.

Before I pass from that altogether, it may be convenient to consider the question of remoteness in connection with that item. If this was a sale of goods, as I think it was, the damages for non-delivery fall to be assessed under the Sale of Goods Act, 1893, s. 51, and, by subsect. (3) of that section, where there is a saleable market for the goods, the measure of damages is *prima facie* to be ascertained as there laid down. In the present case, however, I am abundantly satisfied that there was no available market in which containers could be procured in substitution for those which the defendants had failed to deliver, and ought to have delivered, because Goldsbrough has told me that he made inquiries with a view to getting containers elsewhere without success, and Brooks has agreed that such containers were unobtainable elsewhere. Therefore, the measure of damages is laid down clearly in the general terms of subsect. (2), and has to be the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. Here it is perfectly plain, to my mind, that the defendants knew very well, when they made the contract, that these containers were required for the purpose of putting on sale this new summer cream, that the new summer cream was going to be introduced to the public in the containers at Whitsuntide, with a view to securing what I may describe as the summer market, and that, if the containers were not forthcoming at any rate by Whitsuntide, the whole venture would be a complete fiasco and the plaintiffs would lose the profits which they intended and expected to make. It seems to me that, applying the rule in *Hadley* v. *Baxendale* (1), I certainly ought to say that this loss of profits was in the contemplation of the defendants in such a way that the court should deem that they undertook responsibility for it if they committed a breach of contract by not delivering the goods.

I now come to the expenditure by the plaintiffs in connection with their sales campaign. They had certain advertisements inserted, and they incurred certain other expenses in preparation for the intended sales campaign, and I am quite satisfied that in fact they sustained a pecuniary loss to the extent of those items by reason of the defendants' failure to supply the containers necessary to proceed with the sales. The defendants knew perfectly well that these containers were wanted for the packing of a new summer cream which was going to be introduced by the plaintiffs to the public, and that, in order to introduce to the public a new product of this kind of cosmetics, advertising of some kind would have to take place. The defendants also knew that there would be certain other minor expenses incurred in the way of preparation for sale, such as labels, which form a small item of the claim. Furthermore, they knew perfectly well that it was essential that, when the demand had been created, a supply should be available. The two things go together. If the supply is not available when the demand has been created, then, from the point of view of the seller, his work in creating the demand is thrown away. Therefore, it seems to me to be quite plain that, at the time when the defendants made the contract, they must have known, or ought to have known if they had stopped to think about it, that, if, through their default, the supply was not available to meet the demand, then the expenditure on advertising in creating the demand would be thrown away, and they must have known that that expenditure was going to take place. I slightly modified what I had already said by saying that they would have known if they had paused to think about it, because both counsel reminded me that in actual fact, when two people are making a contract, they are not usually thinking about what the consequences will be to one or the other if there is a breach. What they are both thinking about at the time is that, when they make a contract, it will be carried out, and, in a sense, it is undoubtedly artificial to talk of their contemplating the consequences of a breach. What that really amounts to, however, is that the law implies that each of them would have realised the consequences if he had stopped to think about them. In my view, therefore, it cannot be said that the expenditure on advertising and upon one or two other small matters, such as the cellophane to go over the containers, and the waxed discs, and the artist's drawings, which fall into the same category is too remote in point of law to be established.

I now come to the third category of claim, which has raised some difficulty. With the co-operation of certain newspapers, and more particularly with that of the beauty editresses on those newspapers, the plaintiffs were seeking to introduce this cream to the notice of the public by means of what is called a half-price offer. In point of fact, those newspapers, as everyone knows, go to press long before the date which they bear, and in this case I am satisfied (i) that the contract for the advertisements had to be placed by the plaintiffs at least a month before the date when the advertisements were to appear, and (ii) that, at the time when the plaintiffs committed themselves to this expense, and, indeed, to the other expenses which come into the same category, they were quite justified in doing so, because they had no reason to suppose that the containers would not be forthcoming by the stipulated time. It is evident, as it seems to me, that one reason why it happened was that, right up to the last moment, when it was too late for anything to be done by the plaintiffs to stave off the fiasco, the defendants were repeatedly assuring the plaintiffs that the containers would be forthcoming. It is of some importance to observe that the terms of the paragraphs are such that the beauty editress identifies herself and her paper with the offer, and assures readers, both on behalf of herself and her paper, that, if they post their name and address with 7½*d.* in stamps, they will get the elegant container with a generous supply of wonder cream by return, and to the consequences of that I shall refer presently. In fact, 3,000 of the readers of these various papers did send their names and addresses, each with 7½*d.* in stamps, but they did not get the containers supplied with wonder cream, because there were no containers in which to pack the cream, and that was through the fault of the defendants. Therefore, that being the position, the plaintiffs sent out apologies and ultimately returned the money, in doing which they incurred certain expenses. It is said by Goldsbrough that they had to do that because the papers required it, but it seems to me that, whether the papers required it or not, they, as an honest firm, had to do it. That expenditure was undoubtedly incurred, and again the question of remoteness arises, but I doubt very much whether, even if the defendants were right in their arguments about remoteness, such arguments would avail them as regards that item, or, at any rate, as regards a considerable portion of it, because the defendants requested the plaintiff to take steps to mitigate the damages which it was apprehended would follow from the default, and undertook to bear the expenses incurred in the course of such mitigation. In those circumstances it really would be monstrous if a court were to hold that the buyer is precluded from recovering that expense by reason of the doctrine with regard to remoteness of damage. However, I prefer to consider the question of remoteness in regard to the items which fall within that category for greater caution.

Lastly, there is a claim of a rather special kind. The complaint which is the basis of that claim is this. Goldsbrough apparently had been connected with the distillation and preparation of oils for a very considerable number of years, and, by dint of assisting these beauty editresses with advice, and no doubt in other ways, he had come to be on good terms with them, and able to obtain their assistance to some extent. He says that, whatever may have been the case in former times, beauty editresses will not write up, or comment on, or otherwise assist in the sale of cosmetic productions merely because those productions have been advertised in their papers, but he says that, if one is on good terms with the right beauty editresses and a satisfactory article is produced to them, they may then be willing to assist by recommending it to their readers or by associating themselves and their newspapers with some offer to supply the goods on special terms. That method of promoting the sale of goods, he says, is very valuable, and to be deprived of it is to be deprived of a very substantial advantage. The editresses who do this associate themselves and their newspapers with the offer, and, when the readers accept the offer and send their 7½*d.*, or even when they send only their names and addresses, and do not get the goods which have been offered, they are apt to blame the editress or her newspaper, and, even if they do not, the editress and the newspapers feel that they have been presented in an unfavourable light to their readers, and therefore are not willing to risk that experience again, and, accordingly, that co-operation will thenceforward be refused to anyone who has put them in that position, regardless of whether, upon analysis, that person or his company is to blame. All that seems to me to be quite plainly right. It is the loss of the goodwill of the editresses—the goodwill in the sense of friendliness and a desire to help—which is the subject of this claim. It is not the loss of the goodwill of the public. No such loss is alleged in the statement of claim, and no such loss has been proved. It is a loss quite different from the loss of goodwill in the legal sense which results when a butcher sells bad meat, or when a vendor of another kind sells poisonous icecream, because the goodwill there damaged or destroyed is goodwill in the sense of the probability that the customers will resort once more to the same source of supply.

Counsel for the defendants has raised some arguments of a very serious nature in connection with this head of claim. In the first place, he puts forward the proposition that damages for loss of reputation cannot be recovered in an action founded upon a breach of contract save in certain cases of a special kind which are remote from the case with which I have to deal. There are certain exceptions to that principle undoubtedly, and three of them, I think, are to be found mentioned in the opinion of LORD ATKINSON in *Addis* v. *Gramophone Co., Ltd.* (2), at p. 495. LORD ATKINSON says that he knows of no other exceptions beyond those three, but it may be that, having regard to certain more recent authorities, there are some other exceptions. Counsel for the defendants cited *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ltd.* (3) and suggested that that and similar cases are based upon the fact that there the reputation of one party was part of what the other party, by his contracts, had undertaken to confirm. Therefore, he says, it is natural that damages for breach of that kind of undertaking should be given. I think that I agree with that explanation of that class of case, and I agree further that, having regard to the authorities, of which I need only refer to *Addis* v. *Gramophone Co., Ltd.* (2) and *Groom* v. *Crocker* (4), a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action, subject to certain recognised exceptions, to which I have already referred. However, if, as I think, the proposition of counsel for the defendants goes further than that, and if he is saying that a claim for compensation in respect of pecuniary loss cannot be sustained when the pecuniary loss is sustained through a loss of reputation caused through the breach of contract, then I think that he is putting his proposition too high. I do not think that that proposition can be reconciled with the recent decision of ATKINSON, J., in *Aerial Advertising Co.* v. *Batchelors Peas, Ltd.* (*Manchester*) (5), nor do I think that it is right. I think that, if pecuniary loss can be established, the mere fact that the pecuniary loss is brought about by the loss of reputation caused by a breach of contract is not sufficient to preclude the plaintiffs from recovering in respect of that pecuniary loss.

Such a plaintiff has to overcome two difficulties. In the first place, he must prove with sufficient certainty the occurrence of the pecuniary loss, and, in the second place, he must prove that such pecuniary loss was within the contemplation of the defaulting party at the time when the contract was made. Otherwise it is not recoverable, having regard to the law respecting remoteness of damage. The plaintiff has failed to overcome these two difficulties. Goldsbrough, as I have said, was minded to put this new cream on the market in Feb., 1940. He had assured himself, as he thought, of the co-operation of certain of the beauty editresses in the directions which I have already indicated. It then became necessary for him to arrange to obtain a supply of the containers required, and he got into touch with Brooks, who was then the sales manager of the defendants. Goldsbrough says that he told Brooks the whole scheme. Brooks denies that, and there is a very serious and regrettable discrepancy between their versions of what took place. Goldsbrough is a voluble and enthusiastic person, as many successful business men are, with his own ideas, and particularly, I think, with his own sales methods, and I think that an explanation of much of the discrepancy between the evidence of those two witnesses is afforded by a remark by Goldsbrough that Brooks showed considerably less enthusiasm for and interest in Goldsbrough's methods than Goldsbrough showed himself. I am satisfied, however, that Goldsbrough did sufficiently bring to Brooks' mind that the introduction of this new summer cream to the public was going to be effected at Whitsuntide with the assistance of the puffs in the press and the women's papers obtained through Goldsbrough's friendly relations with the beauty editresses of certain of those papers. I think that Brooks also knew that, if, when it was offered to the public, it was not forthcoming, the relations between Goldsbrough and the newspapers and their beauty editresses would be impaired. I think that all that was knowledge which was open to Brooks if he had paid proper attention to what he was being told by Goldsbrough at the interviews which took place before the contract was made. In substance, I think I prefer Goldsbrough's account of what took place, although I think that perhaps he was somewhat exaggerating the fulness of the explanation which he gave about his scheme, and I am fairly certain that he has exaggerated the degree of attention which Brooks paid to that exposition. However, I think that it was brought home to Brooks' mind, or should have been brought home to his mind, that Goldsbrough's relations with the newspapers would be impaired if this offer of the cream, made with the co-operation of and through the press, was a fiasco because the goods were not forthcoming.

That, shortly, is what I think the position was. Let me now turn to the plaintiffs' two difficulties. In the first place, I have said that the proof that the plaintiffs have suffered any actual pecuniary loss as the result of losing the goodwill of the editresses is inadequate, and the material before me for quantifying that pecunairy loss seems to me to be absolutely nil. That the goodwill of the editresses was an advantage to a man in Goldsbrough's position I have no doubt, and that the goodwill was impaired by this fiasco I also think is at least extremely probable. If Goldsbrough, or his company, thereafter wished to put a new cosmetic on the market and wished for the co-operation of the beauty editresses, it would be a disadvantage to their scheme that that co-operation should no longer be so readily forthcoming. All that is perfectly true, but all that seems to me to be very general, and, although quite real, very vague. In *Aerial Advertising Co.* v. *Batchelors Peas, Ltd.* (*Manchester*) (5), ATKINSON, J., pointed out that a judge is not justified in giving to a plaintiff any more relief than is adequately supported by the evidence called. In that case, he had called before him five or six retail greengrocers, who proved that peas could no longer be sold in the same way in which they were sold before the matters complained of. I have had no beauty editresses called before me, and I must say that I do not think that, if they had been called, they would have carried the matter very much further, because here it is not alleged that the actual buyers of the cream were alienated. It is merely said that the assistance of those who might secure the customers was lost. ATKINSON, J., said, at p. 796:

> Taking it all in all, I think that, if I give £300 damages altogether, I am certainly not giving them too much. I am confident of that. However, I want to err very much on the low side . . .

I can best perhaps put my position by saying that, whatever figure I take (and I am talking now only of the items of claim in respect of the loss of goodwill), I am wholly unable to say with any confidence that it is not too much. I feel I am completely in the dark, and I have no basis for fixing a figure at all. It is quite true that counsel for the plaintiffs urged upon me that the mere difficulty of quantifying a pecuniary loss is not always to be regarded as a sufficient reason for refusing to award anything at all. There are many cases in which the quantifying of pecuniary loss is extremely difficult, and yet the judge has to do the best he can. Here, however, I think that I have no material which enables me to put any figure at all upon that pecuniary loss which the plaintiffs have suffered by reason of the deleterious effect upon their relations with the editresses of this fiasco which the defendants brought about.

The second difficulty seems to me to be also one which the plaintiffs have not successfully overcome. I have said that what I think was brought, or should have been brought, to the minds of the defendants was that, if the goods were not forthcoming, the relations between the plaintiffs and the beauty editresses would not be improved, and might be impaired, but I do not feel at all satisfied that there was brought home to Brooks, at the time when he was negotiating this contract, the knowledge or the means of knowing, that, if the containers were not delivered, pecuniary loss would be caused to the plaintiffs through alienating the goodwill of the editresses. Now that the whole matter has been explained to me by Goldsbrough fully and fairly, I think that I can see that this goodwill of the editresses is of importance, and that, if it is lost, that loss might, in some circumstances, result in pecuniary loss. However, I am not at all certain or satisfied that Brooks was put in a position to see it.

It would not be a fair inference as against the defendants to say that, when they made the contract, they undertook responsibility for that kind of pecuniary loss. I do not think that I ought to impute to them, in the circumstances as a whole, a willingness to bear a loss of that kind. It does seem to me to be an example of this doctrine of remoteness. I think that in this case this damage was too remote, and I think that that would provide an obstacle to this part of the claim, even if, considering what I have already said, the existence of such loss and its quantification had been sufficiently established by the evidence. To my mind, therefore, in so far as it is sought to add to the damages anything in respect of the loss of goodwill of the editresses, that part of the claim fails. The damages recoverable fall roughly into three categories—namely, (i) loss of profit, (ii) preliminary expenditure in connection with the sales campaign, and (iii) expenses incurred in dealing with those applicants who sent their money and did not get the goods. There is one item which I think must be disallowed. I did not hear very much argument about it, but it appears that this offer asked purchasers to remit the money in stamps. Mrs. Carnell, the secretary of the plaintiff company, explained to me that they did not want to keep in their office more stamps than they required for their own purposes, and that, therefore, the stamps had to be taken back to the post office and, so to speak, cashed, the charge by the post office for doing that being 5 per cent. That, it was said, amounted to £2 11*s.*, and is admitted. That was done, as I gather, before there was any question of the scheme being a fiasco, and when the parties still hoped to be able to supply the goods, and it would have been done equally if they had been able to supply the goods. Counsel for the defendants suggested, and I did not receive any very satisfactory answer to the suggestion, that they might keep the smaller stamps. However, I think that that is in a different category, and, not being recoverable, must come off.

Judgment for the plaintiffs for £190 15*s.* 2*d. and costs.*

Solicitors: *Birkbeck, Julius, Edwards & Co.* (for the plaintiffs); *Good, Good & Co.* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

KING FEATURES SYNDICATE INC. *v.* O. AND M. KLEEMANN, LTD.

[House of Lords (Viscount Maugham, Lord Russell of Killowen, Lord Wright, Lord Romer and Lord Porter), **March 11, 13, 14, 17, May 27, 1941.**]

Copyright—Infringement—Cartoons depicting sailor—Reproduction in form of brooches and toys—Whether cartoons designs capable of being registered under Patents and Designs Acts, 1907-1938*—Copyright Act,* 1911 (*c.* 46), *ss.* 1 (2), 2 (1), 22*—Patents and Designs Acts,* 1907-1938, *s.* 93*—Designs Rules,* 1920 (*S. R. & O.*, 1920, *No.* 337), *r.* 89.

S. was the author of a large number of drawings or cartoons depicting as the central figure a grotesque and fictitious character known as "Popeye" or "Popeye the Sailor." and it was admitted that, if there was copyright in these drawings or cartoons, which were published from 1929 onwards in the United States of America and simultaneously in Canada, it was vested in the plaintiffs or one of them. The defendants, without the consent of the plaintiffs, caused to be made and imported into the United Kingdom and there to be sold representations in various forms of a figure which they admitted to be the figure of a sailor. The material forms in which this figure was embodied were brooches or charms, plaster dolls and mechanical toys largely composed of celluloid. The plaintiffs claimed that the figure was that of "Popeye the Sailor," and sued the defendants for damages for infringement of copyright and for an injunction. At the hearing they produced 55 drawings selected from the thousands of drawings of Popeye which had appeared, and upon this it was contended on behalf of the defendants that, as their articles were admittedly copied from articles made by the plaintiffs' licensees, and as it had not been proved or admitted that the latter articles had been copied from the 55 rather than from the thousands of other drawings, it was not proved that any copyright had been infringed. In the course of the case it was admitted that the dolls and toys were reproductions of the drawings, but it was contended that the brooches were not reproductions of any of the 55 drawings relied upon:—

Held: (i) whether the plaintiffs' works were designs capable of being registered under the Patents and Designs Acts, 1907-1938, had to be determined at the time they were produced, and, since they were not designs then, they were not capable of being so registered and the Copyright Act, 1911, s. 22, had no application to them.

(ii) on the facts, the brooches constituted a reproduction in a material form of sketches included among the 55 drawings.

Decision of the Court of Appeal (Scott *and* Clauson, L.JJ., Luxmoore, L.J., *dissenting on the first point,* [1940] 3 All E.R. 484) *reversed.*

[**EDITORIAL NOTE.** The main question here is as to the proper construction of the Copyright Act, 1911, s. 22. The Court of Appeal differed on this question, and the House of Lords have affirmed the dissenting judgment of Luxmoore, L.J. The majority of the Court of Appeal thought that the section had an ambulatory effect, and that it might come into operation some time after the production of drawings for which copyright was claimed. The House has rejected this view, and it is held to be essential that the drawings must be designs within the meaning of the section at the date when they are produced. It is not possible that for some time after production they should be protected by the Copyright Act, 1911, and then, at a later date, they should lose that protection and become subject to sect. 22. It was not contested before the House that figures in three dimensions could not be an infringement of the copyright in a sketch in two dimensions, and it is treated as settled that such a figure can be an infringement of the copyright in such a sketch.

As to Exclusion of Certain Designs from Copyright, see HALSBURY, Hailsham Edn., Vol. 7, pp. 528, 529, para. 831; and for Cases, see DIGEST, Supp., Copyright, Nos. 108a-111a.]

Cases referred to:

(1) *Hanfstaengl* v. *Empire Palace, Ltd.*, [1894] 3 Ch. 109; 13 Digest 210, *460*; *on appeal, sub nom. Hanfstaengl* v. *Baines & Co.*, [1895] A.C. 20.

(2) *West* v. *Francis* (1822), 5 B. & Ald. 737; 13 Digest 217, *539*.

(3) *Ware* v. *Anglo-Italian Commercial Agency, Ltd.* (1922), Macgillivray's Copyright Cases (1917 to 1923), 346.

(4) *Con Planck, Ltd.* v. *Kolynos Incorporated*, [1925] 2 K.B. 804; Digest Supp.; 94 L.J.K.B. 923; 133 L.T. 798.

(5) *Pytram, Ltd.* v. *Models (Leicester), Ltd.*, [1930] 1 Ch. 639; Digest Supp.; 99 L.J.Ch. 381; 143 L.T. 227.

Appeal by the plaintiffs in the action from a judgment of the Court of Appeal (Scott and Clauson, L.JJ., Luxmoore, L.J., dissenting), dated July 8, 1940, and reported [1940] 3 All E.R. 484, varying a judgment of Simonds, J., dated Mar. 20, 1940, and reported [1940] 2 All E.R. 355. The facts are fully set out in the opinion of Viscount Maugham.

C. E. Harman, K.C., and *Frank Gahan* for the appellants.

K. E. Shelley, K.C., and *G. S. W. Marlow* (for *A. D. Russell-Clarke* on war service) for the respondents.

Viscount Maugham: My Lords, this is an appeal from the Court of Appeal (England) (Scott and Clauson, L.JJ., Luxmoore, L.J., dissenting) who on July 8, 1940, reversed a judgment of Simonds, J., delivered on Mar. 25, 1940, and dismissed the action. The action was brought for alleged infringement of the appellants' copyright in certain artistic works—namely, sketches portraying a fictitious character known as Popeye the Sailor—by the importation and sale of certain dolls and brooches. It was admitted that copyright had at one time subsisted in sketches relied on by the appellants, and that the appellants were, or one of them was, the owner of them, and it was also admitted that the respondents had imported and sold the dolls and brooches in question. It was originally contended by the respondents that neither the dolls nor the brooches constituted a reproduction in a material form of any of the sketches relied on, and that, consequently, there was no infringement. Relief was granted to the appellants by Simonds, J., in respect of both the dolls and the brooches. The Court of Appeal differed as to the brooches, holding that these were not a reproduction of any of the sketches. As to the dolls, the Court of Appeal held that they did constitute a reproduction of one particular sketch, but they held (by a majority) that the copyright —or at least the right to restrain infringement of it in this case—was taken away as the result of the operation of the Copyright Act, 1911, s. 22. The respondents were content before your Lordships to accept the view of the Court of Appeal, and they no longer contend that the dolls are not a reproduction in a material form of that sketch. They supported the view of the Court of Appeal as to the brooches, and as to the effect of the section to which I have referred.

The following facts should be stated. The drawings were published in sets or strips of four or five, the first strip appearing in the *New York Evening Journal* on Jan. 17, 1929. In subsequent issues of the same newspaper, further strips were published at frequent intervals. Copies of each issue were publicly sold in Canada simultaneously with publication in New York, and thereby the drawings became copyright in the United Kingdom. Prior to any of the infringements alleged against the respondents, the appellants had granted licences for the reproduction of the figure of Popeye in the form of brooches, plaster or clay-filled dolls or mechanical toys, with the intention (duly carried out by the several licensees) that of each type of brooch, doll or toy more than 50 copies should be made. None of the designs, therefore, was registered under the Patents and Designs Acts, 1907 and 1919. The infringements complained of are of the drawings, and the Act relied on is the Copyright Act, 1911.

For the purpose of the action, the appellants selected, out of the thousands of strips published as before mentioned, 55 strips published between Jan. 17, 1929, and Jan. 16, 1937, and conceded that, if they could not prove infringement of the copyright in one or more of the drawings in these 55 strips, they could not establish any infringement. Before your Lordships, the respondents confined themselves to three contentions. First, they said that in any event the brooch was not an infringement. Secondly, they contended that the appellants had not proved that the licensed articles copied by the respondents had been copied from any of the drawings in the 55 selected strips rather than from any of the other Popeye drawings. Thirdly—and this contention was the one which resulted in the dismissal of the action in the Court of Appeal—they said that, even if their own acts would otherwise have been infringements, the appellants were debarred from any remedy which they might otherwise have had by the Copyright Act, 1911, s. 22, which provides as follows :

> (1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process. (2) General rules under the Patents and Designs Act, 1907, s. 86, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

It should here be mentioned that the vital question arising on this question was not raised in its present form on the hearing before SIMONDS, J., and your Lordships have not, therefore, the advantage of his opinion on the matter. In the Court of Appeal, SCOTT and CLAUSON, L.JJ., took the view that there was a good defence to the action under sect. 22, but LUXMOORE, L.J., thought that the section had no further object than to prevent the application of the Act of 1911 to a work itself capable of registration as a design under the Patents and Designs Act, 1907, so as to confer artistic copyright on that work.

Before considering the effect of this section, I will deal first with the other two contentions of the respondents. The first is as to whether, assuming that the appellants are entitled to copyright in the drawings, the brooches are colourable reproductions in three dimensions of any substantial part of the original drawings. It is not now contended that a figure in three dimensions which reproduces an original artistic work (within the meaning of the Copyright Act, 1911) may not be an infringement of a drawing. On this point, I have nothing to add to that which Simonds, J., and Clauson, L.J., have said. There remains the question whether the figure of Popeye on the brooches reproduces any substantial part of the drawings. The question is one of fact. When, as in this case, the copy or the reproduction is not exact, the court must examine the degree of resemblance. It is impossible to lay down any useful test of what constitutes a copy or a colourable imitation of such a work. I think, as Lord Watson seems to have thought in the not very different case of *Hanfstaengl* v. *Baines & Co.* (1) at p. 27, that the language of Bayley, J., in *West* v. *Francis* (2), though not always applicable, gives some assistance in determining what resemblance constitutes copying. Bayley, J., said, at p. 743:

> A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.

In the same case Lord Shand remarked that, in comparing the works and keeping in view the idea and general effect created by the original, there was [p. 31]:

> . . such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original or the design—having adopted its essential features and substance.

Those were remarks made in reference to the Fine Arts Copyright Act, 1862, and there is in the Act of 1911 no reference to the design of the work, as there was in the earlier Act. I think that that makes no difference, and it seems to me that the remarks of Lord Watson and Lord Shand are applicable to the present case. Accepting those views, and not without some hesitation, I have arrived at the conclusion, agreeing with Simonds, J., and differing, with respect, from the Court of Appeal, that the brooches, like the dolls, on the hypothesis that copyright is established, are infringements of drawing No. 3 in the set of drawings published in the *New York Evening Journal* on June 17, 1929. The second contention is essentially based on a matter of evidence. It is said that, as it had not been proved that the articles made by the appellants' licensees had been copied from the 55 rather than any other of the thousands of drawings by Segar, and as the respondents admitted that they had copied from the licensees' figures, and as it was not proved that all the drawings had been published in Canada simultaneously with publication in the United States, it was not established that any copyright had been infringed. This plea is not to be found in the defence, and omits to notice that the respondents had formally admitted that 55 strips which appeared in the *New York Evening Journal* were the *original* artistic work of Segar, and were simultaneously published in Canada. There was *prima facie* evidence from mere similarity to support the view that the licensees made their figures from one or other of these drawings. The respondents apparently did not ask for the production at the trial of the thousands of other drawings or seek to prove that the figure of Popeye in the drawings subsequent to those published in the issue of the *New York Evening Journal* for Jan. 17, 1929, were anything but copies or imitations of those first published. In these circumstances, I agree with the trial judge and all the Lords Justices that this contention, which has little merit, and seems to have been in the nature of an afterthought, must fail.

The main point is as to the true construction of sect. 22, and here it is desirable to refer to the rule made under the Patents and Designs Act, 1907, s. 86, and authorised by sect. 22 (2). By r. 89, made pursuant to the subsection, it was provided that a design should be deemed to be used as a model or pattern to be multiplied by an industrial process within the meaning of sect. 22 when (i) the design is reproduced or intended to be reproduced in more than 50 single articles unless the articles form only a single set, or (ii) the design is to be applied to printed paper hangings, carpets, certain textile piece goods and other articles which it is not necessary to enumerate. Before construing the section, it may be useful to remember that the Copyright Act, 1911, requires no registration, and confers a right in an unpublished as well as in a published work. It gives to the author a copyright which extends for the life of the author and a period of 50 years after his death. On the other hand, a so-called copyright in a design under the Patents and Designs Act, 1907, can be obtained only by obtaining registration under the Act. It must conform to the definition of a design under sect. 93, and it must at the date of registration be " a new or original design which has not been previously published in the United Kingdom " (sect. 49). The definition states that the design means only the features of shape, configuration, pattern or ornament *applied to an article*. The copyright, moreover, covers only the application of the design to articles in a class in which the design is registered, and there are 13 such classes. Piracy of the design is in effect defined in sect. 60. The point to be noted is that sect. 60 (1) (*a*) makes it unlawful :

> . . . for the purposes of sale to apply . . . to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof except [with the licence or written consent of the registered proprietor . . .

Anyone may lawfully copy the registered design in the ordinary meaning of the word "copy." He may even apply it to the class of goods in which it is registered if he does not do it for the purposes of sale. He may for purposes of sale apply it to articles not in that particular class. What he may not do (except with the licence or written consent of the registered proprietor) is to apply it for the purposes of sale to any article in the class of goods in which it is registered (sect. 60). The registration protects the design for a maximum period of 15 years (sect. 53).

It was evidently not the intention of the legislature, when the Copyright Act, 1911, was being passed into law and the right was being given to every proprietor of copyright to reproduce his work in " any material form whatsoever " (sect. 1 (2)), to give the author of a new or original and previously unpublished design, if he chose to register it, not only the right conferred on him by the Patents and Designs Act, 1907, but also the much more extensive rights which he might get in any drawing of the same design for the life of the author and 50 years thereafter. Yet, apart from special provision in the Copyright Act, 1911, such a drawing, if it or a design taken from it and applied to an article was registered under the Act of 1907, in some cases would, and in many cases might, have received protection under both Acts. It is evident that the inventor of a design intended to be used as a model or pattern to be multiplied by an industrial process must almost inevitably make a drawing or print which is an artistic work within the meaning of the Copyright Act, 1911, and clearly such a drawing or print in some cases may be a design capable of registration under the Act of 1907. On the other hand, an industrial object, whether in two or in three dimensions, may well be an infringement of the artistic copyright in the preliminary drawings or prints made by the author or in the design registered under sect. 49 of the Act of 1907. It is not, in my opinion, open to doubt that the main object of sect. 22 was to prevent such a result, and to leave the author of a design capable of registration, if he intended to use it industrially, with no more than the rights which the Act of 1907 gave him. All the textbook writers have taken that view, which, indeed, is almost an obvious one. It is possible, however, that sect. 22 has further effects and that possibility must now be considered. Sect. 22 (1) may be a little easier to understand if it is rewritten thus : " This Act shall apply to designs capable of being registered under the Patents and Designs Act, 1907, which are not used or intended to be used as models or patterns to be multiplied by any industrial process. With that exception, this Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907."

The design, it is clear, is entitled to the benefit of the Copyright Act, 1911, if it is *not used or intended to be used* as a model or pattern. (For brevity, I will omit in what follows the words " to be multiplied by any industrial process.") The questions arise : " Not used by whom ? At what time ? Who is it that is not to have the intention to use it ? When is that negative to be satisfied ? " My Lords, I cannot doubt that the person so referred to is the author, and that the time is the time when the design comes into existence. That, I think, is the natural meaning of the words, and attributes a reason for the introduction of a reference to the intention of some person who does not need further description. The matter is not altogether free from authority, for in *Ware* v. *Anglo-Italian Commercial Agency, Ltd.* (3) RUSSELL, J., expressed the opinion on a motion that the intention referred to in sect. 22 must be taken to be the intention of the author of the work, and be ascertained at the time of the making of the work. The majority in the Court of Appeal have, I think, taken the view that the section has a sort of ambulatory effect, so that, if an author of a design capable of being registered has not used it, or intended to use it, as a model or pattern, he will obtain a copyright under the Act of 1911, but, if he or a licensee at some future date, perhaps many years afterwards, uses it, or intends to use it, as a model or pattern, then sect. 22 applies, with the consequence, as I understand it, that the Act of 1911 ceases to protect the design or the drawing which was the origin of it. I should observe here that, in my view, it is impossible to construe the section as having the limited effect of permitting the piracy of copyrights still in existence, since the section begins with the words: "This Act shall not apply." There seems to be no ground for holding that the Act applies in part. The real question must be whether, in the event which has happened, the Act has ceased to apply to *the drawings*. That it does not apply to the figures made by the licensees is, in my opinion, immaterial and irrelevant as soon as it is established that the respondents' figures are *prima facie* infringements of the drawings.

My Lords, there are reasons for thinking that sect. 22 is not open to such a construction. There is nothing in the section to suggest that a copyright gained by an author under the Act is to be terminated or destroyed at some later date. The words "not used or *intended to be used*" in the context seem to point to a condition upon which a copyright under the Act of 1911 may be acquired in the first instance. It would be almost impossible to apply the section if the copyright might be terminated long after it came into existence by *the mere intention* to use the work as a model or pattern either of the author or of someone deriving some right from him. How can one apply the section if the copyright is to cease to exist on the formation of an undisclosed intention at a date after the copyright has come into existence? On the other hand, it does appear to be a possible view that the legislature thought that it would not be very difficult to ascertain, when the author of a design (or the drawing from which the design was made) had completed his work, whether he intended it simply as a work of art or as a model or pattern to be multiplied by an industrial process—in other words, whether or not he regarded it as a species of commercial enterprise. It does not seem to have occurred to the draftsman, if we may judge from the terms of the section, that the artist might have mixed intentions, or that, having created an artistic work, he or his executors or his assignees might desire at some future day to industrialise the work and to cause it to be multiplied in articles to which it was capable of being applied. I am far from suggesting that the section is an example of perfect drafting. I am content to say that I can find no words which point to the view that sect. 22 is contemplating a terminable copyright.

The difficulties of the construction contended for by the respondents do not end there. They have to say that the copyright in the drawings under the Act of 1911 came to an end at the moment when Cecil Coleman, Ltd., proceeded under licence from the appellants, King Features Syndicate Inc., to manufacture dolls or brooches representing Popeye the Sailor, or formed an intention so to do. There was no registration under the

Patents and Designs Act, 1907. It was admitted before your Lordships that the original drawings were not capable of being registered as designs, and it is not quite clear that this alone is not enough to put the respondents out of court, on the grounds that these drawings are not within the precise words of sect. 22 and that the copyright in them remains untouched. This point, however, was not relied on. It may involve too narrow a view of the section, and I shall assume, for the present purpose, that the section applies both to designs capable without alteration of being registered and also to drawings or the like which, with slight modification, can be turned into designs capable of being registered. On that basis, it is said that a design could be, and was in fact, made by the licensees from one of the drawings and applied to an article and multiplied, and that, therefore, the Act of 1911 ceased to protect the drawing. The same result must, therefore, be taken to have followed if there had been a consent in writing to any use of the drawing for the purpose of a design to be multiplied, however limited in scope and time the consent might be. If, for example, the licence given by the author is to employ the drawing as a design for a specified book and is used by the licensee (with consent) to obtain a registered design under the Patents and Designs Acts, he could then only obtain registration in Class 2 (" books and bookbinding of all materials "), and (subject to the terms of the licence) he would have the exclusive right to apply the design to any article in that class. As already stated, he would have no right to restrain the application of the design to articles in any other class. It is most difficult to see why such a licence should have the result of completely destroying the rights of the author to prevent infringement of his fine art copyright under the Act of 1911. It is true that counsel for the respondents argued that the result in such a case would only be to throw open to the world the right to use the design originally protected in Class 2—namely, for books and bookbinding—but this seems to me to be an almost impossible limit to place upon the argument, for no such limitation can be derived from the words of sect. 22, and it would be impossible to apply any such limitation in a case where there is no registration, as in the present case. The only logical contention must be that the lawful use or intended use for multiplication of the original drawing as a design by any authorised person, whether the design is registered or not, and, if registered, whatever the class in which it is registered, *ipso facto* has the result that the Copyright Act, 1911, automatically ceases to protect any design taken from the original drawing capable of being registered under the Patents and Designs Act, 1907, including any drawing from which the design has been made. I am unable to see anything in the section which justifies so curious a result. By the Copyright Act, 1911, the legislature has thought fit to enact that during a very long term unauthorised persons can be restrained from producing or reproducing the copyright work in any material form whatsoever. The only result of giving sect. 22 its most natural meaning is that this right under the Act of 1911 may continue, even though, at some time after the work in question was first created, the author or someone deriving title from him has thought fit to use the work, or a design taken from the work, as a model or pattern to be multiplied by an industrial process. This does not seem to be a very shocking result, A because, after all, people are not compelled to copy the original works of others. The author is, in such a case, left with precisely the same rights in the original work as he had before the work was used or intended to be used as a model or pattern for multiplication, and he will not get any right to restrain a design which is a reproduction or imitation of the B original work in a material form which he had not got before. My conclusion, therefore, as to the true construction of sect. 22 is the same as that at which LUXMOORE, L.J., arrived. I think that this appeal should be allowed. There should be an injunction to restrain the respondents from infringing the copyright of the appellants in the C drawing No. 3 in the first published strip of drawings in the statement of claim mentioned by making or causing to be made without the appellants' consent articles reproducing in a material form the figure of a sailor delineated in the drawing, or by selling the same, or by way of trade exposing or offering the same for sale, an order for delivery up of infringing D articles for destruction, and an inquiry as to what damages, if any, have been sustained by the appellants by reason of the infringement by the respondents of the appellants' copyright in the drawing No. 3, and by reason of the conversion by the respondents of the articles which so infringe the appellants' copyright. The appellants should pay the E costs here and below. I beg to move accordingly.

LORD RUSSELL OF KILLOWEN [read by LORD WRIGHT]: My Lords, in the course of the debate, it became apparent that the questions for our determination were two, and two only—namely, (i) whether the brooches F constitute a reproduction in a material form of any of the sketches of Popeye contained in the 55 strips, and (ii) whether the Copyright Act, 1911, s. 22, affords a defence to the action. As regards the first question, I agree with the view of SIMONDS, J. For my purpose, it is sufficient to refer to sketch No. 3, of which I think a substantial part is reproduced in G the brooches. The question of colour is immaterial, but I find reproduced in the figure of which the brooches consist the following salient features of Popeye in sketch No. 3—namely, the sailor's cap, the nose, the chin, the mouth, the swollen forearms, the baggy trousers, and the enlarged feet. This, I consider, constitutes a reproduction of a substantial part H of sketch No. 3. Further, I am of opinion that a comparison of the brooch with the sketch in question raises a strong presumption (not displaced by any evidence) that the figure of the brooch was copied directly or indirectly from that sketch. In those circumstances, the contention of counsel for the respondents, which was described by the trial judge as a somewhat unattractive argument, does not arise, and need not be considered.

There remains the question of sect. 22, as to the effect of which a difference of judicial opinion has arisen. The plea of sect. 22 as relied upon before Simonds, J., seems to have assumed the following form—namely, a contention that the sketches of Popeye were designs which were capable of being registered under the Patents and Designs Act, 1907, and were not within the exception contained in sect. 22, with the result that the plaintiffs never had any copyright therein. In other words, that sect. 22 afforded a defence because it established absence of copyright in the plaintiffs. Simonds, J., rejected this contention.

In the Court of Appeal, and in your Lordships' House, sect. 22 was relied upon as affording a defence, not because it established absence of copyright in the plaintiffs, but because it exonerated the defendants from any liability for acts which (but for the section) would have been infringements of the copyright conferred upon the plaintiffs by sect. 1 of the Act. The foundation of this contention was the licence, granted for a limited period and on specific terms, to certain persons (not the defendants) to make dolls and brooches copied from the sketches of Popeye, identical with those which the defendants subsequently produced but without the plaintiffs' permission. The argument then proceeds that the dolls and brooches produced by the plaintiffs' licensees were designs which were capable of being registered under the Patents and Designs Act, 1907, and were not within the before-mentioned conception. So, too, were the dolls and brooches copied from them by the defendants. Therefore (and this is the climax), as a result of the Copyright Act, 1911, s. 22, sect. 2 (which defines infringement) and sect. 6 (which gives remedies for infringement) do not apply to the articles which the defendants have manufactured and sold.

My Lords, the licensees are, of course, protected from the charge of infringement by their licence, but that the effect of the grant by the owner of the copyright in a sketch of a figure to A of a limited licence to reproduce for sale the figure in three dimensions is that B is (by virtue of sect. 22) franked for ever in a career of piracy is a result so startling as to require the clearest words of enactment to justify it. Clauson, L.J., in an elaborate judgment has come to the conclusion that the defendants' contention is right, and Scott, L.J., agreed with his conclusion. On the other hand, Luxmoore, L.J., assigns a more limited operation to sect. 22—namely, that it operates to prevent the acquisition of copyrights in the defined cases, but does not operate to take away or impair a copyright already bestowed. The judgment of Clauson, L.J., adopts the reasoning of the defendants which I have already indicated, but I fail to appreciate the necessity of introducing any reference to the licence or the licensees. If the argument is sound as stated, I do not see why it is not equally sound simply to say that a reproduction by anyone of the sketch-figure in three dimensions intended to be used as a model to be multiplied by an industrial process is a design to which the Copyright Act does not apply, and, therefore, is an article to the production and sale of which the owner of the

copyright in the sketch can raise no objection. In my opinion, this view of the operation and effect of sect. 22 is wrong. There is no previous authority to justify or support it, nor is there anything in the wording of the section to suggest that the Act, having operated to confer copyright
A on an individual with remedies for its protection, is to cease or suspend its operation for any reason. The words "shall not apply" point to the section being concerned only with circumstances in which the Act shall never come into operation at all. In other words, the section (as pointed out in COPINGER, LAW OF COPYRIGHT, 5th Edn., p. 66) is providing for
B exclusion from protection under the Act of the designs therein described. It does not operate to bring an existing artistic copyright to an end, or to absolve pirates from the offence of piracy.

I agree with the view of LUXMOORE, L.J., as to the effect and operation of the section, and I would allow the appeal. The order of the Court of
C Appeal should be discharged, and an order should be made in accordance with the submission contained in para. 14 of the case for the appellants. The respondents should pay the appellants' costs of the trial, of the appeals to the Court of Appeal and to this House.

D LORD WRIGHT: My Lords, of the various general questions which were agitated and decided in the courts below, one alone has been raised before your Lordships. It is a question of some importance, because it involves determining what is the construction of the Copyright Act, 1911, s. 22, so far as relevant to the facts of the case. I must, however, before
E discussing that question of principle, state my conclusion on a limited issue of fact on which the respondents succeeded in the Court of Appeal but failed before SIMONDS, J., the trial judge. Three classes of the respondents' productions were said to infringe the appellants' copyright in the sketches of Popeye the Sailor. These were the brooches, the
F dolls, and the mechanical toys. The two latter classes were held by the unanimous decision of the Court of Appeal to be actionable infringements apart from the defence based on sect. 22. The first class, the brooches, were held by the Court of Appeal not to be copied from the appellants' sketches, directly or indirectly. It was rightly not questioned in this
G House that, under the Copyright Act, 1911, s. 1, the sole right to produce or reproduce the sketches or any substantial part thereof in any material form whatsoever would cover a reproduction of a substantial part of the sketches or any of them in three-dimensional form, as by the dolls or the mechanical toys. In the case of these, it was not contested before this
H House that the dolls or the toys were reproductions of a substantial part of the sample sketch selected though in a different medium—namely, plaster—and in coloured three-dimensional figures, as contrasted with the flat published sketch in plain black-and-white. However, the respondents supported the view of the Court of Appeal that, in regard to the brooches, no copying, whether direct or indirect, was made out. This is a question of fact. No evidence of the actual operation of copying or of its absence

has been given. The respondents called no evidence. The issue must thus be determined simply on the basis of a comparison between the brooches (which may be treated as all of the same design, notwithstanding some minor variations in the actual examples) and the selected sketch, which was No. 3 of the sketches published in the *New York Evening Journal* on Jan 17, 1929. The test to be applied is purely visual, the sketch and the brooch being compared *oculis subjecta fidelibus*. It is not material that the respondents were stealing the idea of Popeye the Sailor, or availing themselves for commercial profit of the popularity acquired by that figure. The appellants' copyright is in the actual sketch, and not in the idea. There would be no infringement if the respondents had independently produced a similar figure without copying the sketch directly or indirectly. The question is whether there was copying of the actual sketch. Here the only evidence of actual copying direct or indirect is similarity in regard to the figure, which is a substantial part of the sketch, between the copyright work and the alleged infringement. I think, however, that, where there is substantial similarity, such similarity is *prima facie* evidence of copying, which the party charged may refute by evidence that, notwithstanding the similarity, there was no copying, but independent creation. In the present case, on a careful comparison of the brooches and the sketch, I find substantial similarity between the different editions of the brooch and sketch No. 3, sufficient to raise a *prima facie* case of actual copying. The respondents have called no evidence to rebut that *prima facie* case. I agree, accordingly, with Simonds, J., in finding that copying is proved in respect of the brooches, equally with the dolls and toys.

On that footing, as regards all three classes the only defence now set up by the respondents is based on the Copyright Act, 1911, s. 22. On this defence, Simonds, J., decided in favour of the appellants, but the majority of the Court of Appeal (Luxmoore, L.J., with whose judgment I agree, dissenting) reversed that decision. Sect. 22 provides as follows :

> (1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process. (2) General rules under the Patents and Designs Act, 1907, s. 86, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

By the Designs Rules, 1920, r. 89, it is provided (*inter alia*) that a design (other than textile designs, which are differently dealt with) is to be deemed to come within sect. 22 if reproduced or intended to be reproduced in more than 50 articles not together constituting a set. The designs of the dolls, toys and brooches were admittedly used and intended to be used in more than 50 articles which were to be made in, or imported into, the United Kingdom by the respondents.

The respondents' contentions may be stated very broadly, but not, I think, unfairly, to be that the dolls, toys and brooches were designs within sect. 22, and, as such, had a character separate from the sketch which they substantially reproduced, and that, though, apart from sect. 22, they would have been infringements of the appellants' copyright in the sketch for which the remedies under the Act could have been enforced, sect. 22 gave a complete immunity in respect of the infringements by reason that, A under the provisions of the section, the Act was not to apply to them at all, because they were designs to which the section applied, and thus no proceedings for the infringements were competent. It was not contended that the appellants had lost their entire copyright in the sketch, but it was said that a portion was carved out of the full copyright, which thus became B reduced or truncated to the extent that the respondents had lost the right to the protection of the Act against the particular infringements involved in the respondents multiplying the dolls, toys and brooches. It was conceded that, if the appellants had not granted, as they did, licences to certain licensees for a period of one or two years to copy the sketch in the C form of the dolls, toys and brooches, they would not have lost the right to take action against the respondents for infringement of their artistic copyright, but it was said that the appellants lost their full copyright by licensing the creation of the designs, and had lost it for the full period of the artistic copyright even though the licence was limited to one or two D years, and was limited to the particular kinds of articles. I find this argument very difficult to understand. I cannot see how the position of the unlicensed copyist in face of the copyright owner can depend on the circumstance that the latter has granted a licence to a third party by way of whose productions the defendant has copied the plaintiff's work. E However, I need not pursue that difficulty, because I cannot extract from the words of sect. 22 the principle that an unlicensed copier is immune from proceedings for infringement at the suit of the copyright owner simply because the form in which he has copied is the production of material articles which satisfy the statutory definition of designs, and, F subject to the conditions postulated in the Trade Marks and Designs Acts, may be entitled to protection as designs. There is nothing in the Copyright Act, 1911, s. 22, which can be construed as cutting down or destroying the full scope of the artistic copyright once it has attached under the Act, or giving a licence to an infringer to pirate the copyright G work so long as the piracy takes the form of the production of designs within the statutory meaning of that word. In my opinion, clear words would be required to deprive a person in whole or in part of his full copyright without his consent once that copyright has accrued to him, or to grant a charter to a stranger to steal the property of the copyright H owner. Sect. 22 appears to me to admit of a simpler and more reasonable interpretation. By its express terms, the Act is not to apply to such designs as fall within the specified limitations. In my opinion, the legislature is there drawing a distinction between copyright under the Act of 1911 and what has been called design copyright, or copyright in designs, under the Patents and Designs Acts. The latter is a right distinct from the former. The statutory definition of design now in force is found in the Patents and Designs Act, 1919, s. 19, which replaces that given in the Patents and Designs Act, 1907, s. 93. The operative definition, so far as here material, is as follows:

> "Design" means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye . . .

Thus, design involves certain elements. There must be features of shape, configuration, pattern or ornament, and these must be applied (or intended to be applied in the words of the Copyright Act. 1911, s. 22) to any article by way of industrial means or process. Sect. 22 emphasises the same aspects. Designs to which the section is to apply are those used or intended to be used as models or patterns to be multiplied by any industrial process. Thus, a design may be the shape of a coal scuttle, a basin, a motor car, a locomotive engine or any material object. It may be the shape embodied in a sculptured or plastic figure, which is to serve as a model for commercial production, or it may be a drawing in the flat of a complex pattern, intended to be used for the manufacture of linoleum or wall paper. Design copyright is thus to be distinguished from artistic copyright. Indeed, though the design itself cannot acquire artistic copyright, a photograph or drawing of it may. I think it is clear from these definitions that sect. 22 cannot apply to the appellants' sketch. It was made as an illustration in a newspaper, and for no other purpose. So far as appears, or can be inferred, there was no intention to use it as a model or pattern to be multiplied by any industrial process. It was not, it is true, a work of any high artistic merit, but it was clearly entitled to the protection which the Act of 1911 gives to artistic copyright. It was not until about eight years after its publication in the newspaper that the appellants granted a licence for the making of the dolls, toys and brooches. When that licence was acted upon, for the first time there came into existence designs, because there came into existence models or patterns intended to be applied to the particular articles licensed and intended to be multiplied by industrial processes. These designs were potentially the subject of the rights given by the Patents and Designs Acts, but they did not in fact acquire these rights, because, though capable of being registered under the Acts by the licensees, they were not actually registered. If they had been registered, and if the Acts had been otherwise complied with, they would have acquired the rights under the Patents and Designs Acts, which are much narrower than those given by the Copyright Act, 1911. For instance, such rights would have been for a limited period of 5, 10 or 15 years, and in respect only of the articles for which registration was granted. Having these rights as designs, they were not to have any further or other rights under the Copyright Act, 1911. It was not intended that they should have a cumulative protection both under the Copyright Act, 1911, and under the Patents and Designs Act.

However, I have been unable to appreciate how all this can affect the artistic copyright for England which is vested in the appellants in regard to the sketch. That copyright was acquired when the sketch was published in Canada, simultaneously with its publication in the United States, where it was made. There was then no idea of using it for a design or model or pattern for industrial purposes. The multiplication of copies of the sketch by the ordinary processes of printing did not, in my opinion, make it a design within the Patents and Designs Act, 1919, or within the Copyright Act, 1911, s. 22. It was never, until some years after the sketch acquired its artistic copyright, used or intended to be used as a model or pattern. The difficulties which, in some other cases, may exist in applying the statutory definitions or descriptions of designs to artistic works—such as pictures, drawings, sketches and sculptures—do not, I think, arise in this case. There is no reason why the sketch should be considered at its inception as a design within the meaning of the Patents and Designs Act, 1919, and I see no reason to hold that it ever changed its character as an artistic production, entitled to protection under the Act of 1911.

In a case like this, the use or intention to use which sect. 22 postulates must exist at the date when the sketch was made. That is the natural time. At that time, the copyright under the Act of 1911 either vests or is excluded under sect. 22. On the facts of this case, the sketch was never a design to which sect. 22 had any application. The dolls, toys and brooches could acquire no rights save under the Patents and Designs Acts in their character of designs. Sect. 22 is not a very perfect example of drafting. I think the governing element in the definition is the use of the design or the intention to use the design as a model or pattern for industrial multiplication. There may be artistic works which *ab initio* fall within the category of designs, as my noble and learned friend LORD RUSSELL held in *Ware* v. *Anglo-Italian Commercial Agency, Ltd.* (3). The design there was a drawing for a motor car body. The drawing was made for the specific purpose of applying the features of shape and configuration found in the drawing to a number of such bodies exceeding 50 by means of industrial processes. In these circumstances, the effect of sect. 22 was held to be to exclude the drawing from protection under the Copyright Act, 1911, which, on the facts, never applied to the drawing. In *Con Planck, Ltd.* v. *Kolynos Incorporated* (4), SANKEY, J., seems to have been prepared to adopt a similar test. He was disposed to think that [p. 815]:

> . . . a design is something produced as a pattern to assist one in making some other article . . . a thing which has no market in itself but is meant to be applied to some other article.

In cases of that nature, what might in other circumstances have been regarded as entitled to artistic copyright may be held to be a design entitled, if other conditions are fulfilled, to protection under the Patents and Designs Acts but excluded from the protection under the Copyright Act, 1911, by sect. 22. Such a case is illustrated in *Pytram, Ltd.* v. *Models (Leicester), Ltd.* (5), where CLAUSON, J., held that a wolf cub's head, produced as a model for multiplication by industrial processes, was not entitled to copyright under the Act of 1911 because of sect. 22.

Nor had it any protection as a design, because it had not been registered. On the other hand, a picture produced by an artist or a piece of statuary produced by a sculptor does not lose its copyright under the Act of 1911 merely because at some later date it or some portion of it is used as a model or pattern for the multiplication by industrial methods of objects of commerce—for instance, for wall papers or figures in relief or three-dimensional figures. I can conceive some difficult problems arising in cases of this nature, but they do not arise in the present case, in which sect. 22, in my opinion, has no application to the sketch. I agree that the appeal should be allowed.

Lord Romer [read by Lord Porter]: My Lords, of the two questions which alone have to be decided on this appeal, one is of considerable general importance. It is the question whether, in view of the Copyright Act, 1911, s. 22, the present action is maintainable at all. The other is relatively of little importance except to the parties to the present litigation. It is the question whether, assuming the first question to be answered in the affirmative, the Popeye brooches being sold in England by the respondents constitute an infringement of the appellants' copyright.

The facts material to a decision of the two questions have been fully stated in the opinion of my noble and learned friend Viscount Maugham. I need not repeat them, and can turn at once to a consideration of the Copyright Act, 1911, s. 22. It is a curiously ill-drafted section, and it is by no means easy to make it fit in with the definition of the word " design " for the purposes of the Patents and Designs Act, 1907, which is now contained in the Patents and Designs Act, 1919, s. 19. That definition is in these terms:

> " Design " means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction . . .

A design capable of reigstration under the Patents and Designs Act, 1907, cannot, therefore, consist of a mere conception of the features mentioned in the section, or, in the case of an article in three dimensions, of a representation of such features in two dimensions. It must, in such a case, in order to comply with this definition, consist of the features as they appear in the article to which they have been applied by some industrial process or means. I do not doubt that, for purposes of convenience in keeping the register, the thing actually registered will often be a representation in two dimensions of the thing which is used or intended to be used as a model or pattern, but this fact cannot, in view of the definition, make such a representation a design capable of being registered under the Patents and Designs Act, 1907, within the meaning of the Copyright Act, 1911, s. 22. It may at first sight appear that, in view of this definition of the word "design," the exception contained in sect. 22 (1) is to some extent unnecessary and superfluous, but this is not so. The important word in this exception is "multiplied." Although, therefore, a design must consist of features already applied to some article by some process or means of an industrial nature, it is not affected by sect. 22 (1) unless it has been, or is intended to be, multiplied by such a process to the extent prescribed by general rules made in pursuance of the provision contained in subsect. (2) of the section.

My Lords, I have ventured to make these observations because before SIMONDS, J., it was contended by the respondents that the drawings of Popeye the Sailor published in and subsequent to 1929 in the United States and Canada were themselves designs capable of being registered under the Patents and Designs Act, 1907. If this contention could be maintained, it would follow that the appellants have no copyright in the drawings at all unless they fall within the exception contained in sect. 22. The question would then arise whether the use of the drawings which was made by the appellants' licensees as patterns for the multiplication of their dolls and brooches by an industrial process deprived the appellants of the benefit of the exception. However, the contention of the respondents to which I have referred was rejected, and, in my opinion, rightly rejected, by SIMONDS, J. It is quite plain that the drawings are not themselves designs capable of registration under the Patents and Designs Act, 1919. No one could rightly say that by these drawings the author had applied features of shape or configuration to any articles by some industrial process or means, nor did the respondents in their arguments before your Lordships rely upon any such contention. Indeed, in para. 14 of their printed case, they state in terms that they do not contend that the sketches are registrable as designs, or that they are deprived of artistic copyright so as to prevent the appellants from restraining, for example, their republication in a rival newspaper. What they do contend is that, when the licensees of the appellants applied by industrial process the features of shape and configuration depicted in the drawings to their dolls and brooches, there came into existence a registrable design which was used or intended to be used as a model or pattern to be multiplied by an industrial process within the meaning of r. 89 made pursuant to sect. 22 (2). Their contention so far is unquestionably sound, but their next contention is that thereupon the appellants ceased to be able to prevent the respondents from reproducing the drawings in the form of the dolls or brooches, even assuming that the brooches would otherwise have infringed the appellants' copyright. This, they say, is the effect of sect. 22. Their argument is, as I understand it, as follows: "It is in effect provided by sect. 22 (1) that the Act shall not apply to a design capable of being registered which is lawfully used or intended to be used as a model or pattern to be multiplied by any industrial process. It therefore follows that sect. 1 (2) of the Act must be read as though after the words 'in any material form whatsoever' there were inserted words excepting such a design as above-mentioned. The respondents have not, therefore, done anything the sole right to do which is by the Act conferred upon the appellants, and, accordingly, have not infringed the appellants' copyright within the meaning of sect. 2 (1)." It will be observed that in this argument the respondents have introduced into sect. 22 (1) the word "lawfully." This they felt constrained to do, because otherwise the section, upon their construction of it, would have had a perfectly ridiculous result. No owner of the copyright in an artistic work could ever have restrained the use of it as a design. The introduction of the word "lawfully," moreover, does not, according to the respondents' contention, put them out of court. The appellants' licensees were obviously using the design lawfully, and, as they did not register it under the Patents and Designs Act, 1919, the respondents, so they argue, could lawfully copy it. However, if the word "lawfully" be introduced into sect. 22 (1), it must surely mean lawfully as between the owner of the copyright in the artistic work and the person who makes the design, and to say that the respondents lawfully copied the design begs the question which has to be decided.

However, my Lords, even if the last-mentioned argument be conceded to the respondents, I cannot bring myself to think that this contention of the respondents as to the effect of sect. 22 (1) is a sound one. I can find no justification in that section for introducing into sect. 1 (2) of the Act an exception which is not there, and all the more so because, unless the exception is to render sect. 22 (1) ridiculous in its relation to artistic works, there has also to be introduced into the last-mentioned subsection a word which likewise is not there. In my opinion, the only object and the only effect of sect. 22 (1) are to ensure that the Act shall not confer upon a work which is a design within the meaning of the Patents and Designs Act, 1919, s. 19, artistic copyright under the Copyright Act, 1911. Such a construction of the section seems to me to give full effect to every word of it and to produce a sensible result. It is the construction which was put upon the section by Luxmoore, L.J., who, in my opinion, arrived at a right conclusion upon the matter.

As regards the question of whether the brooches being imported and sold by the respondents are a reproduction in a material form of a substantial part of the drawing No. 3 in the strip appearing in the *New York Evening Journal* of Jan. 17, 1929, I respectfully differ from the decision of the Court of Appeal and agree with that of Simonds, J. In my opinion, the proper inference to be drawn from a comparison of the drawing and the brooches made by the appellants' licensees (of which the respondents' brooches are an exact copy) is that, in designing the brooches, the licensees copied the principal features of the drawing. It is no doubt quite possible that the licensees copied one of the drawings subsequently published, in which the author himself repeated those features. It is also possible that no copying of any of the drawings took place in fact. In other words, the inference which I have drawn might have been displaced by oral evidence. However, it was not, and the inference remains. For these reasons, I am of opinion that the appeal should be allowed.

Lord Porter: My Lords, this case raises a difficult question as to the true construction and effect of the Copyright Act, 1911, s. 22. Save for a subsidiary point which is substantially a point of fact, **Simonds**, J., in the court of first instance took one view, whereas the Court of Appeal by a majority reversed his finding. On the subsidiary point, all the members of the Court of Appeal differed from the view of the judge of first instance. Admittedly, the appellants are, or one of them is, the owner of the copyright in a fictitious character Popeye the Sailor, who was originally depicted in a series of drawings in strips. The appellants were minded to exploit the popularity of this figure, and accordingly granted a licence to certain licensees to manufacture and sell brooches and mechanical dolls of certain types simulating it. These brooches and dolls were produced and sold by the licensees in number far exceeding 50, but neither brooch nor doll was registered by the appellants or by the licensees in any class under the Designs and Trade Marks Act, 1907. The respondents, having observed the success of the licensed productions, were anxious to share in the profit so gained, and, with a view to obtaining a licence for themselves, approached the appellants in order to ascertain what remuneration would be required. Being unable, however, to obtain terms sufficiently attractive, they proceeded to have the licensed brooches and dolls exactly copied in Japan and imported and sold them in England. The appellants thereupon sued the respondents for infringement of copyright, claiming certain declarations, an injunction, various accounts, and delivery up of infringing copies and plates for destruction.

The respondents defended their action on a number of grounds not now relied upon, and by two arguments upon which your Lordships have to pronounce. First, they said that it had not been proved that the brooches were a reproduction in a material form of any of the appellants' sketches which were relied upon, and, secondly, they said that in any case the Copyright Act 1911, s. 22, was a defence to the action. The first point requires a little more amplification of fact. The strips representing Popeye the Sailor are admittedly very numerous. In order not to overburden the case, the appellants chose 55 strips only upon which they relied for proof of their case. No evidence was called, but the appellants put in the 55 strips and a number of examples of the dolls and brooches. No question arises as to the dolls. It is admitted that they were a reproduction in a material form of the appellants' sketches, but the brooches, it was said, exhibited no sufficient likeness to the strips to show that they were copies of the principal figure in any of the strips relied upon. They might well be, and were more likely to be, copies from other strips. Indeed, it was said that the respondents did not know from what the brooches had been copied, since they had imitated, not the sketches themselves, but the licensees' productions, and could not tell which of the many figures had been used as a model. No evidence to this effect was given, however, and it was admitted that this argument could not succeed if the representation on the brooch bore a likeness to the figure of Popeye on any one of the 55 strips sufficient to afford *prima facie* proof that any one of those figures had been the original from which the brooch was derived.

Your Lordships have therefore to determine whether the brooch sufficiently resembles any of the 55 sketches so as to afford *prima facie* evidence that it is a reproduction in a material form of one of them. Counsel for the appellants stated that he was content to rely on the resemblance to figure No. 3 in strip No. 1 of those put in. For myself, I think the resemblance is sufficient. It repeats the salient features. The cap, face, nose, chin, mouth and pipe, swollen forearms, baggy trousers and feet are all there. This is the subsidiary point on which all the members of the Court of Appeal differed from the judge and held that the brooches were not a reproduction of sketch No. 3, or, indeed, of the figure in any of the 55 strips. I prefer the view of Simonds, J., and, in coming to that conclusion, I have not forgotten two arguments of the respondents' counsel. In the present case, he contended that the brooch had not been proved to have been copied from any one of the 55 strips. There were a very large number of other strips not proved to be the subject of copyright from which it might have been copied, and, obviously, if it were a reproduction of something not in itself the subject of copyright, it could not be an infringement. However, if the respondents desire to rely on this argument, they must prove it. None of the other strips was produced, and there was no evidence that the brooch resembled any one of them, whereas there is a marked resemblance to those produced. Secondly, it is argued that Simonds, J., applied the wrong test. He asks, it is said, " Could this be recognised as a new material form of the essential Popeye ? " instead of asking, " Is this a copy of a material sketch ? " Bayley, J., in *West* v. *Francis* (2) defined a copy as [p. 743] :

> . . . that which comes so near to the original as to give to every person seeing it the idea created by the original.

This definition was criticised by Lord Watson in *Hanfstaengl* v. *Baines & Co.* (1), at p. 27, where he pointed out that the idea created by a picture or drawing does not necessarily form an element in the original work or its design which is protected by copyright. The same idea which is suggested by the copyright work may be expressed by another painting or drawing which is in no sense a copy and does not borrow its design. No doubt, if the judge had asked himself whether the essential idea of Popeye had been utilised in the dolls and brooches, instead of asking whether one or more of the material sketches had been copied, he would have applied the wrong test. However, I do not understand him to have come to his conclusion because he thought that the idea of Popeye had been copied. He meant, I think, only that the brooch sufficiently resembled the figure as drawn in any one of the strips relied upon, the salient features being practically identical in each.

In my view, therefore, all the suggested infringements are in the same category. All are copied from some of the sketches, and of each the question must be determined : " Is the reproduction protected by the

Copyright Act, 1911, s. 22 ? " Sect. 22 (1) provides as follows :

> This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

It was not disputed that the dolls and the brooches were designs capable of being registered under the Patents and Designs Act, 1919, and it was admitted that they or their prototypes were used, and intended to be used, as models or patterns to be multiplied by an industrial process within the provisions of the Act and of the Designs Rules, 1932, r. 92.

The exception, therefore, does not apply, and the contest between the parties turns upon the true construction of the first two lines of sect. 22 as quoted above. The appellants said that they mean that the copyright conferred under the Copyright Act, 1911, shall not extend to designs capable of being registered under the Act of 1907. In their contention, the section prevents such designs from acquiring copyright under sect. 1 of the Act of 1911, but in no way interferes with any other copyright which would be infringed by their production in material form. If, as in this case, copyright has been acquired in a sketch, and either the owner of the copyright himself or his licensee produces a registrable design from it, the design, unless registered, is not the subject of any copyright, but the original sketch retains its copyright, and, if an unlicensed person copies the design and that design would, if produced without the consent of the owner, be an infringement of copyright in the sketch, then the unlicensed person is an infringer, and none the less so because he copied the design, and not the sketch. In their submission, sect..22 does not deprive an owner of copyright already acquired under the provisions of the Copyright Act, 1911, s. 1, or prevent him from suing for its infringement under sect. 2. It merely prevents a fresh copyright from coming into existence. The copyright in the sketch remains, but without registration no design copyright is obtained in the brooches or dolls.

The respondents on their part admitted that copyright had originally been acquired in the sketches, but said that sect. 22 took away that copyright, so far as the brooches and dolls were concerned, because they were registrable designs which had not been registered. In these circumstances, the respondents maintained that the appellants not only had failed to acquire any copyright in the brooches and dolls but had lost certain rights in the original sketches which they would otherwise have retained. They had, it was said, lost the right to complain of a reproduction of the licensed brooch or doll, though they could prevent any other infringement of their copyright in the sketches. The argument, as I understand it, was as follows. The words used in sect. 22 are " This Act shall not apply to designs, etc." The Act, therefore, does not apply for any purpose. On the one hand, it does not confer copyright under sect. 1 of the Act in respect of designs capable of being registered, and, on the other hand, those designs are not to be deemed to be infringing copies of any other copyright work under sect. 2. They are taken out of the Act altogether. They neither acquire copyright nor infringe copyright. They might be protected by registration under the Patents and Designs Act, 1907, and so themselves acquire copyright, but, if capable of registration, they acquire, as it were, an existence independent of the original sketch, if that sketch is not itself a design capable of being registered, and, apart from registration, no one can be restrained from copying them.

The respondents acknowledged that the result of such an interpretation of the section would be that, if a pirated copy of a copyright work were used as a registrable design, it would not constitute an infringement of the sketch from which it was derived, and that, consequently, the pirate who made but did not register it could use it without a penalty. This somewhat peculiar result might, as the respondents admitted, be the logical consequence of their argument, but, they said, this difficulty would be overcome if the words of the exception were read as meaning : " except designs which, though capable of being registered, are not *lawfully* used or intended to be used as models," etc. " Lawfully," as the respondents urged, should be read into the section by necessary implication. If, therefore, the sketches were used by a pirate as a model for a registrable design, he would infringe the copyright in them, but, if they were so used either by the owner of the copyright in the sketches or by a licensee the designs would be lawfully used, and, if not registered, anyone was free to copy them.

It was further contended that a construction which left a double copyright, first, in the sketches, and, secondly in the design, would defeat the object of the Designs Act, since that Act confined the period of copyright to 10 or at most 15 years, whereas the Act of 1911 gave not less than 50 years. Anyone, therefore, who first published the work for which he wished to acquire copyright in a form which could not be registered would acquire pictorial copyright, and, if at a later stage he decided to use it as a design, his pictorial copyright would protect him for the longer period even though he failed to register the design. Arguments *ab inconvenienti* are not in themselves very conclusive as to the meaning of an Act of Parliament, and in the present case this last contention depends on an event not very likely to occur in practice. In most cases, the subject of copyright will at its inception either be intended to be used as a design for multiplication or composed for its own sake. It may be that, in the latter event, in some exceptional cases the subject-matter will afterwards form the basis of a design, and so acquire the potentiality of protection under the Designs Act in addition to the fine art copyright which it has already obtained, but, even if this be so, the true construction of the section depends upon its wording rather than upon a possibly unexpected result.

One is thrown back, therefore, upon the words themselves. It is plain that the respondents can only succeed if the word " apply " bears the construction which they seek to put upon it. In support of their contention, they called attention to the contrast in language between sect. 22 and sects. 23 and 35 (2). In the first, in their submission, the wording is appropriate to prevent the Act applying for any purpose, whether to protect a work or to restrain an infringement. In the second, it is appropriate for the purpose of conferring copyright, and, in the third, for the purpose of preventing infringement. Undoubtedly the language varies, but the deduction sought to be drawn is not, I think, warranted. A mere contrast in language between section and section may be—and I think here is to be—explained by reference to the difference in subject-matter rather than by an intention to produce a different result. For its true construction, therefore, the exact wording of sect. 22 must be considered, and that wording is, to my mind, far too indefinite to take away any copyright already acquired. It is more readily explicable as intended to prevent the acquisition of a fresh copyright. The Act is not to apply to—i.e., is not to confer copyright upon—registrable designs. It would be to make an unjustifiable addition to the natural meaning of the words to read them as enacting that registrable designs shall not constitute an infringement of copyright already acquired in drawings from which they are derived. Had it been intended to produce this result, it would have been easy to make the intention clear.

It has been recognised that, in construing sect. 22 (1), it is convenient to disregard the double negative and treat the section as though it read: "The Copyright Act shall not apply to the designs of works used or intended to be used as models or patterns to be multiplied by any industrial process where the designs of such works are capable of being registered under the Designs Act." "Design" is now defined by sect. 19 of the Act of 1919 as follows:

> "Design" means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include . . . anything which is in substance a mere mechanical device.

Design, therefore, may be embodied in a sketch illustrative of the model which is to be multiplied or in the model itself, e.g., in a sketch of a brooch or doll or in a brooch or doll itself. In the present case, the designs were presumably either a sketch prepared by or on behalf of the licensees or a completed brooch or doll. Whichever they were, being unregistered, they were not subject of design copyright under the Act of 1907, but the original sketches, which were not used nor intended to be used as models or patterns to be multiplied by any industrial process, retain their copyright, and their owner can prevent any infringement of that copyright, though the licensees could make no complaint of the reproduction of their designs, which were both intended to be, and were, so used. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the appellants); *Derick R. Martin & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BOMFORD *v.* OSBORNE.

[House of Lords (Viscount Simon, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Porter), **March 27, 28, May 27, 1941.**]

Income Tax—Schedule B—Nurseries and market gardens—Mixed farm—Worked as single unit—Assessment—Income Tax Act, 1918 (*c.* 40), *Sched. B*, *rr.* 1, 8.

Where a farm is worked as a mixed farm but as a single unit, it should be assessed as a farm and the assessment should not be apportioned, one part being assessed as a farm and other part as a nursery or market garden.

Decision of Court of Appeal (Clauson and Goddard, L.JJ., Scott, L.J. dissenting, [1940] 1 All E.R. 91) *reversed.*

[**EDITORIAL NOTE.** On the point here considered, there was a *dictum* by Finlay, J. (as he then was), in *Dennis* v. *Hick* (2) and a decision of the Court of Session in Scotland in *Lowe* v. *Inland Revenue Comrs.* (1). Lawrence, J., in deciding this case would have preferred the *dictum* of Finlay, J., but felt bound to follow the decision of the Scottish court. By a majority the Court of Appeal affirmed this decision. The House of Lords have, however, reversed the decision of the Court of Appeal, and have approved the dissenting judgment of Scott, L.J. The decision would have been one of importance to farmers, since the House has found itself able to reverse a decision which would have involved many practical difficulties in its application to farm lands at the present time ; but there is before Parliament at the present time a bill repealing the rule 8 here discussed and largely curtailing the farmer's right to be assessed under Sched. B.

As to Nurseries and Market Gardens, see HALSBURY, Hailsham Edn., Vol. 17, p. 72, para. 145 ; and for Cases, see DIGEST, Vol. 28, pp. 15, 16, Nos. 75-83.]

Cases referred to :

(1) *Lowe (David) & Sons, Ltd.* v. *Inland Revenue Comrs.* (1938), 21 Tax Cas. 597 ; Digest Supp.

(2) *Dennis* v. *Hick* (1935), 19 Tax Cas. 219 ; Digest Supp.

(3) *Monro & Cobley* v. *Bailey* (1933), 102 L.J.K.B. 471 ; Digest Supp. ; 148 L.T. 505 ; 17 Tax Cas. 607.

(4) *Back* v. *Daniels*, [1925] 1 K.B. 526 ; 28 Digest 15, *74* ; 94 L.J.K.B. 304 ; 132 L.T. 455 ; 9 Tax Cas. 183.

Appeal by the taxpayer from a judgment of the Court of Appeal (Clauson and Goddard, L.JJ., Scott, L.J., dissenting), dated Dec. 20, 1939, and reported [1940] 1 All E.R. 91, dismissing an appeal from a judgment of Lawrence, J., dated May 26, 1939,, and reported [1939] 3 All E.R. 259. The facts are fully set out in the opinion of Viscount Simon, L.C.

A. T. Miller, K.C., and *L. C. Graham-Dixon* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

Viscount Simon, L.C. : My Lords, the question to be decided arises on a case stated by General Commissioners under the Income Tax Act, 1918, s. 149. The appellant occupies about 550 acres of land in the Pershore district of Worcestershire, and the commissioners reached

the conclusion that the arable portion of the land (except that used for the growth of hops), amounting to about 230 acres out of the whole, should be separately assessed for the year ended Apr. 5, 1937, as "gardens" under Sched. B. r. 8, while the rest of the holding should pay
A tax under that schedule in the ordinary way by reference to assessable value. The case came before LAWRENCE, J., who, if he had felt free to give effect to his own opinion, would have decided in favour of the taxpayer, on the view that the facts before the commissioners did not justify the separate assessment. However, he considered that he was
B constrained by the decision of the Court of Session in *Lowe (David) & Sons, Ltd.* v. *Inland Revenue Comrs.* (1) to decide in favour of the Crown, but he struck out of the area classed as "garden" some 26 acres of arable carrying wheat, parsnips, mangolds, and lucerne, on the ground (with which I thoroughly agree) that there was no justification for holding
C that this land was "ancillary" to the garden. In the Court of Appeal, there was a difference of opinion. CLAUSON and GODDARD, L.JJ., took the view that the General Commissioners were justified in deciding against the taxpayer, while Scott, L.J., in an elaborate judgment, involving both historical research and a full examination of the earlier cases which
D might bear on the matter, was of a contrary opinion. The taxpayer now appeals to this House.

Sched. B, r. 8, provides as follows:

> The profits arising from lands occupied as nurseries or gardens for the sale of the produce (other than lands used for the growth of hops) shall be estimated according to the provisions and rules applicable to Sched. D, but shall be assessed and charged under this schedule as profits arising from the occupation of lands.

E

As SCOTT, L.J., points out, the substance of this rule, so far as it applies to gardens, may be traced back to its origin in Addington's Income Tax Act, 1806. At that distant date, and for long afterwards, it may be presumed that the distinction between gardens and farm land was easily
F made. "Gardens for the sale of produce" were market gardens, usually situated near large towns, cultivated for the most part by spade, rake, and hoe, and growing characteristically garden crops. The researches and quotations of SCOTT, L.J., make this plain. The qualification "for the sale of the produce" is manifestly inserted so as to exclude from the rule
G gardens where produce is grown for the supply of an adjoining house belonging to the same occupier, or gardens where the profit is made by charging the public for admission. However, a great change has come over the face of the country since 1806 in this respect, with the result that the distinction between garden and farm is not now so easy to draw.
H In consequence of a greater variety of products grown on farms, a better knowledge of the principles governing rotation of crops, and a revolution in transport, as the result of which Covent Garden and similar markets can be supplied in bulk from a great distance with vegetables and fruit, much of the produce which was at one time confined to gardens may now be part of the output of a farm. The cultivation in open fields with a view to sale of what in earlier days would be regarded

as a characteristically garden product cannot in itself justify the conclusion that such fields have become " gardens." Etymologically, the word appears to imply that the ground is enclosed, and in common understanding a method and intensity of cultivation specially suitable to an area set apart for horticulture are part of the general conception. The present appeal, however, can be decided without adventuring upon the difficult task of precise definition. I am quite prepared to accept the view that a defined area may be a " garden " for the purposes of r. 8, even though it is not fenced round, as long as it is a distinct and separate unity devoted to gardening. On the other hand, as I have already said, a field or fields of farming land should not be called a " garden " merely because they grow products which used to be characteristic products of gardens, or even products which are still mainly or largely found in gardens. The main test, in my opinion, is that the defined area shall be subject to that nature and intensity of treatment which are characteristic of horticulture.

The commissioners set out in a series of lettered paragraphs running from (*a*) to (*r*) the facts which were proved or admitted before them, and, in order that my judgment may be complete and self-contained, I must reproduce these paragraphs *in extenso* :

> (*a*) For the year in question the appellant was the occupier of 550 acres. (i) Part of the land at Springhill and the land at Fingerpost Ground and Lower Moor was arable (excluding land utilised for the cultivation of hops) upon which the following crops were growing during 1936 : 16 acres wheat, 7 acres potatoes, 3 acres mangolds, ½ acre lucerne, 26½ acres peas, 18½ acres beans, 44½ acres brussels sprouts, 4 acres savoys, 18½ acres cauliflower, 3½ acres leeks, 4 acres carrots, 6 acres parsnips, 2 acres asparagus, 5 acres plants, 1 acre rhubarb, 17 acres plums, 1½ acres blackcurrants, 32 acres strawberries, 5 acres raspberries, 2 acres loganberries, 11½ acres fallow. (ii) The remainder of the land at Springhill and land at Willspit consisted of 82 acres mowing grass, 178½ acres grazing, 40 acres hops, 7 acres osiers. (*b*) The following livestock was kept by the appellant : 16 horses, 90 cattle, 232 sheep, 1,012 pigs, 8,045 poultry. The horses worked upon the farm. Cattle, sheep, pigs and poultry were produced and bred by the appellant upon the land. (*c*) The whole acreage occupied by the appellant was worked as a single mixed farm in one unit. The appellant employed ordinary farm-labourers, who were not highly skilled. (*d*) The appellant used very up-to-date appliances and practised mechanised farming over the whole farm. The minimum of hand labour was used in producing crops upon the arable land, much of it being machine-planted and machine-hoed. (*e*) The appellant was a registered producer under the Pigs Marketing Scheme. (*f*) The wheat was grown [upon 16 acres of the arable land] partly to obtain the subsidy payable under the Wheat Act and partly to provide straw litter for the pigs. The mangolds, parsnips and lucerne were grown to provide feed for the stock and horses. (*g*) The livestock, pigs and poultry were kept not for the purpose of providing manure for the arable and pastoral land but for their fattening and sale. (*h*) During the winter the poultry had access to the arable land. (*i*) The purchases and sales of livestock in 1936 were £5,386 1*s.* 6*d.* and £22,147 10*s.* 7*d.* respectively. (*j*) The wages for the year amounted to £9,684 17*s.* 10*d.* A big proportion of this expenditure was incurred in relation to the pigs and hops. The numbers of regular employees were 80 men and 29 women. These workers worked indiscriminately upon the whole farm, whether upon the sheep, pigs, cattle and poultry, or upon the pasture and/or the arable land, often being engaged upon different parts of the farm at different times in the same day. (*k*) The cost of labour over the whole farm was £12 per acre and for the land upon which fruit and vegetables were grown £18 per acre. (*l*) The purchases of artificial manures amounted to £1,471 8*s.* 6*d.* only and had been progressively reduced year by year as the manure produced by the pigs increased. (*m*) The purchase of feeding stuffs amounts to £10,939 4*s.* 2*d.* (*n*) There are no glasshouses on the land occupied by the appellants and no nursery work was done upon any part of the land. (*o*) The methods of cultivation were the ordinary accepted agricultural methods. (*p*) The appellant styles himself a farmer and fruit and vegetable

> grower on his notepaper and bill heads. (*q*) Some of the produce of the land used for growing fruit and vegetables was sold in various towns through an agent in the usual manner in the district. (*r*) In order to obtain continuity of supplies not always possible from appellant's own land produce is sometimes obtained from other growers and sold by appellant under commission.

After setting out the rival contentions, the commissioners then express
A their conclusion in para. 5 of the case as follows :

> We, the commissioners, have come to the conclusion that the lands occupied by the appellant can be divided for purposes of assessment under Sched. B and accordingly find as a fact : (1) That the farming operations on the arable land (apart from that used for the growth of hops) are ancillary to the market-garden operations. (2) That the whole of the arable land (apart from that occupied for the growth of hops) is occupied as gardens for the sale of produce. (3) That the remainder of the land
> B occupied by the appellant is devoted to farming operations and is assessable under the ordinary rules applicable to Sched. B . . . The appeals will therefore be dismissed as far as the principles at issue are concerned, but, in arriving at this decision, the commissioners are not confirming the amount of the assessments and, in the event of the actual liability of the year in question not being agreed between the inspector of taxes and the appellant, the appeals are to be regarded as being kept open for the question of the amounts of the liability to be argued before the
> C commissioners.

The first question which arises is whether it is in point of law competent to split a single holding into two parts with a view to applying r. 8 to one portion of it, while leaving the other portion to be assessed under the ordinary provisions of Sched. B. The possibility of this was
D affirmed by the Court of Session in *David Lowe & Sons, Ltd.* v. *Inland Revenue Comrs.* (1) and was recognised by FINLAY, J., in the course of his judgment in *Dennis* v. *Hick* (2) at p. 228. I accept the possibility of such a division of a unit of occupation, provided that the distinction between the portion which is "occupied as gardens for the sale of
E produce" and the separate portion which is not so occupied is really made out. In the present case, however, the facts found in paras. (*a*) to (*r*) do not in my opinion justify such splitting. As SCOTT, L.J., pointed out, there is nothing in the findings of the commissioners to indicate that the fields, which they added together and pronounced
F to be occupied as "garden," were not scattered over the whole holding, so as to be interspersed with mowing-grass or pasture fields, and SCOTT, L.J., continued as follows, at p. 97 :

> Indeed, it was common ground, as we were informed, that the arable fields were in fact so interspersed.

G Moreover, an area which is to be classed as "garden" must have a certain permanence as such, for the assessment of profits under r. 8 is by reference to the profits of the preceding year, and was formerly by reference to the average of three preceding years. If a field is subject to rotation of crops, so that last year it was part of the ordinary farm
H but this year is pronounced by the commissioners to be a "garden," merely because it is this year producing what they regard as a garden crop, there would be no past profits of the "garden" upon which the assessment under r. 8 could be fixed. In short, a "garden" within the meaning of r. 8, whatever else the word implies, must have some degree of fixity and local continuance, and cannot come and go over different portions of the area according to the system of rotation employed.

I wish now to make an observation on the way in which the case is stated. It is important for commissioners, in drawing up a case for the High Court, always to bear in mind that, under sect. 149, the case is required in order to challenge the determination of the commissioners "as being erroneous in point of law." By sect. 149 (*d*), the case is required to "set forth the facts and the determination of the commissioners," and the "determination" is the decision of law at which the commissioners have arrived upon the facts proved or admitted before them. It is, of course, only a determination on a question of law which is liable to be corrected by the High Court. The commissioners' statement of the facts is final. The High Court can only discharge its proper function in dealing with a case stated if the contents of the case show with reasonable clearness what is the question of law, if any, which arises. In the present instance (and the practice is not uncommon), the commissioners, after carefully setting out exhaustively the facts proved or admitted, proceed in a subsequent paragraph to state their own conclusions as a finding of fact. Presumably, the commissioners mean to say that they deduce from the facts which were proved or admitted the three conclusions stated in para. 5, and that they regard these conclusions as matters of fact. No doubt there are many cases in which commissioners, having had proved or admitted before them a series of facts, may deduce therefrom further conclusions which are themselves conclusions of pure fact. In such cases, however, the determination in point of law is that the facts proved or admitted provide evidence to support the commissioners' conclusions. I think that it would tend to clearness, and be in closer correspondence with the intentions of sect. 149, if commissioners in such a case as this would state that the question of law is whether the facts found or admitted can support their further conclusions of fact. This preferable way of stating a case in such circumstances has often been followed, for example, in *Lowe's* case (1), at p. 603.

Coming now to the three numbered conclusions which the commissioners consider they can, and should, deduce from paras. (*a*) to (*r*), the first conclusion seems to me entirely unsupported by the facts found. The contention that operations on an adjoining area are "ancillary" to the market-garden operations appears to be copied from a contention of the inspector of taxes in *Dennis* v. *Hick* (2), at p. 223, where the contention succeeded. However, that was a case where 263 acres were found to be a garden, partly in view of the high cost of labour employed there, partly because of heavy manuring, and partly because of the nature of the crops. Finlay, J., felt that he could not interfere with this conclusion of fact, and the judge further held that there was evidence to support the conclusion that the use of the remaining land was ancillary to—that is, subservient to—and intended to assist, the market-gardening business. In the present case, there appears to me to be no such supporting evidence at all, for the wheat was grown partly to obtain the subsidy under the Wheat Act and partly to provide straw litter for the pigs, while the mangolds, parsnips and lucerne were grown to provide feed for the stock and horses. Thus, the facts found go to show that the area which the commissioners deduce to be ancillary A to the so-called garden is in fact ancillary to the other part of the farm which they admit is not garden at all.

The remaining conclusion of the commissioners raises the question whether the facts proved or admitted can justify the view that the remainder of the arable land was "garden." Reading the findings B as a whole, and applying the test above indicated that a "garden" implies, amongst other things, the use of special and intense methods of cultivation, I cannot discover how the facts could sustain the commissioners' conclusion. The decision on this issue in *David Lowe & Sons, Ltd* v. *Inland Revenue Comrs.* (1), which influenced LAWRENCE, J., C in rejecting the appeal, appears from the judgments to have turned largely on an admission by counsel for the taxpayer. The LORD PRESIDENT says, at p. 604:

> Counsel for the appellants admitted that, if the use of land for growing vegetables such as these for sale for human consumption can be regarded as a use of the land as a garden for the sale of the produce within the meaning of r. 8, he would have found it difficult to maintain that these lands, if they had been the only lands cultivated D by the appellants, had not been properly assessed under r. 8.

In the same case, LORD FLEMING states, at p. 606, that the first reason advanced against the assessment of the lands as garden was "that the produce grown on them was used for human consumption." On this point, I can well understand that the appeal failed, for it would E seem a curious reason for declining to call a garden by that name to say that it was growing vegetables for human consumption instead of flowers and fruit. The reports in the Tax Cases, useful as they are, do not as a rule give even the briefest outline of the contentions of counsel, and it is, therefore, sometimes difficult to make sure what is the meaning of the F reference which judges make to counsel's argument. However, in any case, it is clear, in my opinion, that the decision in *Lowe's* case (1) on this point does not embarrass the present appellant.

There remains to be examined the decision in *Monro & Cobley* v. *Bailey* (3), which is the only previous decision on r. 8 pronounced by the G House of Lords. That was a very special case. The holding was devoted to the growing of bulbs for sale, and, as a secondary matter, to the growing and selling of flowers produced by the bulbs while so growing. The cost of the labour employed on the bulbs amounted to more than three times per acre the price of ordinary farming. There was evidence upon H which the commissioners could find, and did find, that the part of the area not actually occupied with the growing of bulbs was none the less part of one entire holding, in which the purpose of producing bulbs predominated. VISCOUNT BUCKMASTER pointed out that the taxpayers limited their bulb-growing to 60 acres [p. 474]:

> . . . because it is necessary, for change of soil and other reasons, that they should use no more.

I find no difficulty in distinguishing *Monro & Cobley* v. *Bailey* (3) from the present, and I accordingly move your Lordships that the present appeal should be allowed with costs here and below.

Viscount Maugham: My Lords, in this case, there has been some judicial difference of opinion. The trial judge, Lawrence, J., was in favour of the taxpayer, the present appellant, but thought he was bound by authority to decide in favour of the Crown. In the Court of Appeal, Clauson and Goddard, L.JJ., took the view that the general commissioners were justified in deciding against the appellant, but Scott, L.J., in a very careful and elaborate judgment, was for deciding in the appellant's favour. The appeal seems to me to raise a question of considerable importance to a large number of farmers in this country, and I should like to say that counsel on both sides, by their able arguments, have rendered great assistance to the House.

The matter comes before your Lordships on a case stated under the Income Tax Act, 1918, s. 149, by the commissioners for the general purposes of income tax for the division of Pershore West, in the county of Worcester. Viscount Simon, L.C., has fully set out the material paragraphs of the case. The question is whether the appellant was rightly assessed to income tax for the year ended Apr. 5, 1937, in respect of a single mixed farm of some 550 acres by two separate assessments. The whole of the arable land (229 acres) was assessed by reference to the profits of the preceding year as being "lands occupied as nurseries or gardens for the sale of the produce" within the meaning of the Income Tax Act, 1918, Sched. B, r. 8. The remaining land, consisting mostly of mowing-grass, grazing and hops (in all some 307 acres), was taxed by an assessment on the annual value in accordance with the general rule of Sched. B. This is clearly an unusual, if not an unprecedented, method of assessing a mixed farm which *prima facie* appears to be a single assessable unit, and, in my opinion, strong reasons must exist to justify such a course. The special case should state facts which are at least sufficient to justify the general commissioners in separating or splitting the farm into two areas and in treating one of the areas as "gardens for the sale of the produce." I need not add anything to what Viscount Simon, L.C., has said on this aspect of the case. The question which emerges is whether there are any facts stated in the case which justify the course which the commissioners took.

That the whole farm is occupied and worked as a single unit appears clear from the following findings in the special case:

> (c) The whole acreage occupied by the appellant was worked as a single mixed farm in one unit. The appellant employed ordinary farm-labourers, who were not highly skilled. (*d*) The appellant used very up-to-date appliances and practised mechanised farming over the whole farm. The minimum of hand labour was used in producing crops upon the arable land, much of it being machine-planted and machine-hoed . . . (*f*) The wheat was grown [upon 16 acres of the arable land] partly to obtain the subsidy payable under the Wheat Act and partly to provide straw litter for the pigs. The mangolds, parsnips and lucerne were grown to provide feed for the stock and horses . . . (*h*) During the winter the poultry had

> access to the arable land . . . (*j*) . . . The numbers of regular employees were 80 men and 29 women. These workers worked indiscriminately upon the whole farm, whether upon the sheep, pigs, cattle and poultry, or upon the pasture and/or the arable land, often being engaged upon different parts of the farm at different times in the same day . . . (*o*) The methods of cultivation were the ordinary accepted agricultural methods.

The case shows that the appellant carries on farming operations of various kinds. He keeps over 1,000 pigs and over 8,000 poultry, as well as considerable numbers of sheep, cattle and horses. He buys and sells livestock. He grows and sells small fruit and a considerable quantity of vegetable produce not of the cereal kind. It is correctly described as a mixed farm. The occupation of each part derives benefit from the occupation of the other parts. For example, the manure produced by the pigs is used on the arable, and no doubt is responsible for its fertility, and the wheat, parsnips, mangold and lucerne are grown to provide feed for the stock, and, it may be added, are therefore not within r. 8.

I should mention here that I propose for the sake of brevity to use the word " farm " as a synonym for lands " occupied for the purposes of husbandry," which is the old-fashioned phrase still used in the Income Tax Acts. " Husbandry," in fact, means the business of a farmer. I shall make some remarks later as to the words " lands occupied as nurseries or gardens for the sale of the produce " in r. 8, but I wish to observe here that that rule is obligatory. It seems to be clear that the nurseries or gardens for the sale of the produce must have boundaries capable of being definitely ascertained. Moreover, it is plain from Sched. B, r. 5, that a farm cultivated according to the usual custom and methods of farmers for the purpose of growing crops and other produce in the open as food for human beings and beasts cannot be a garden within r. 8. That follows from the fact that a man occupying lands for the purposes of husbandry only—that is, an ordinary farmer—has an option under r. 5 to be assessed and charged under Sched. D instead of under Sched. B, r. 1. In contrast to this, r. 8 provides that the profits of the nurseries or gardens must in every case be assessed and charged under Sched. B as profits arising from the occupation of lands. The farm lands may thus be assessed and charged under Sched. D. The nurseries and gardens must be assessed and charged under Sched. B. The conclusion is inevitable that the two kinds of lands are quite distinct. Either a certain area is land " occupied as nurseries or gardens for the sale of the produce," and is, therefore, to be taxed in relation to profits, or it is not. There must therefore be ascertained facts which lead the commissioners to class a particular area as " nurseries or gardens." *A fortiori* must this be so when the area in question is admittedly a portion of a single mixed farm worked in one unit. The commissioners have no discretion in the matter. I emphasise this because the decision in the Court of Appeal seems to be based on the view that what the commissioners say is " garden " must be " garden." CLAUSON, L.J., says that the test is whether the *locus* in question is occupied as nurseries or gardens for the sale of the produce. With the greatest respect, this does not seem to me to be a test at all. It is the problem to be solved. The test, if it can be found, should determine whether the area is land occupied by a farmer taxable according to r. 1, or whether it is land "occupied as nurseries or gardens for the sale of the produce" within r. 8. To say that the commissioners have applied the right test, in the absence of any statement by them, or by the court, as to what the test is, seems to me not to solve, but to avoid, the whole question. I find myself compelled to prefer the judgment of Scott, L.J., who has, if I may respectfully say so, attacked the problem with equal care and erudition, and has given, if not a rigid test, at least one which is capable of being applied to the particular case which comes before us. I shall now state my reasons for agreeing with his conclusions.

The only fact, so far as I can see, which is alleged to justify the splitting of the farm into two separate units for the purposes of taxation is that considerable parts of the arable land were in the year of assessment used for growing crops of vegetables predominantly of a non-cereal character, and some 57 acres for growing small fruit. I will take the vegetable area first. There are here found to be 16 acres of wheat, 7 acres of potatoes, 3 acres of mangolds, ½ acre of lucerne, 26½ acres of peas, 18½ acres of beans, 44½ acres of brussels sprouts, 3½ acres of leeks, 4 acres of carrots and 6 acres of parsnips. These, it will be remembered, are grown in the open, by ordinary accepted agricultural methods, and by ordinary farm-labourers, who are not highly skilled and who work indiscriminately on the whole farm. I have mentioned these crops because it is common general knowledge that crops of this nature are, and have for years past commonly been, grown on ordinary farms in different parts of Britain where the soil is suitable for raising them. A reference to the Government Paper (Cmd. 285) giving a return of the agricultural output for England and Wales, 1925, is sufficient to support this statement. It is, for instance, impossible to suggest that potatoes, peas and beans are not now just as commonly grown on farms as cereal crops, or, for that matter, as turnips, cabbages, rape, mustard and other cruciferous and leguminous crops. The crops I have mentioned occupy in this case 129½ acres out of 160 acres of arable land (apart from the land used for fruit and the fallow), which the commissioners have treated as "garden" within the meaning of r. 8.

There are some vegetables grown on the arable land as to which I do not think it can be asserted as common general knowledge that they are commonly grown by farmers as ordinary farm crops, though, for all I know, it is so. There are 4 acres of savoys, 18½ acres of cauliflowers, 2 acres of asparagus, 1 acre of rhubarb, and, in addition, 5 acres of "plants" of which the nature is not stated. It seems to be impossible to regard this small proportion (some 30 acres) of a farm of 550 acres and an arable area of 229 acres as justifying the finding of the commissioners in a case where these crops are grown on a farm by ordinary farm-labourers and in the open by ordinary agricultural methods. It is, in my opinion, quite wrong to suppose that crops like these, or newly-introduced crops, raised for the purposes of food for man or beast, coming into vogue and capable of being, and in fact being, grown in the way described, afford any ground for asserting that the area on which they are grown can be singled out as a garden within r. 8. As for the 57½ acres of small fruit, it is well-known that all these fruits, with the possible exception of the 2 acres of loganberries, are ordinary farm produce grown in the open in Kent and in various other counties where the conditions are favourable. In many counties there is hardly a farm to be found without its orchard, and it has become very common to grow small fruit for market in various counties, particularly in Kent and in Worcestershire. In my opinion, it is erroneous to think that crops which have been described as greengrocers' stuff and ordinary small fruits are not quite properly grown on an ordinary farm where ordinary agricultural methods are employed. Farming is an industry which changes with the times, with modern knowledge of soil cultivation, and with the needs of changing markets and new methods of distribution. It must be progressive, or it will have little future prosperity. The mere fact that a farmer undertakes the raising of a new crop—such, for example, as sugar-beet was a few years ago—by ordinary methods affords, in my opinion, no ground for the conclusion that the farm or the portion of it so employed is in any true sense a garden for the sale of produce.

In this connection, it also has to be remembered that a farmer's business does not consist simply of raising crops in a single year of assessment. It is his duty to his landlord, if he is a tenant—and I think also to the state itself—to do his best by his farming operations to preserve the fertility of the soil. I suppose most educated persons know something of various systems of rotation of crops, and of the advantages to the soil which may be obtained by the growing of certain non-cereal crops in certain soils—for example, by the growing of nitrogen-accumulating plants or of deep-rooting plants such as currants. It would be singular and very unfortunate if it could be held that the existence of such a crop in the year of assessment would justify the commissioners in treating the farm, or a selected part of it, as a garden within the rule. To avoid misconception, I will state here that many of the crops I have referred to can be, and are, grown in market-gardens. My point is that they are to a much greater extent grown on farms, and the mere fact that one finds such crops on a piece of land does not prove that it is a garden rather than a farm. The matter, however, does not rest there. As Scott, L.J., pointed out, the commissioners did not suggest that there was any physical separation which had enabled them to split the holding geographically into two self-contained units and to decide that the whole of the arable land was not part of the farm, but was a garden for the sale of produce. Indeed, Scott, L.J., states that it was admitted in argument that arable fields were in fact interspersed with mowing-grass or pasture fields. There are, however, two findings stated in the case to be findings of fact which are apparently supposed to justify the separation or splitting of the farm. The first is that the farming operations on the arable land (apart from that used for the growth of hops) are " ancillary " (which means " subservient ") to the market-garden operations. The second is that the whole of the arable land (apart from that occupied for the growth of hops) is occupied as gardens for the sale of produce. I am at a loss to understand either of these so-called findings of fact. If the second were true, there would be no need for the first. It is a finding that a certain large area is a garden, but it cannot, in my opinion, be reconciled with the findings in para. 2 which I have set out, unless we are to suppose that commissioners can at their pleasure pick out fields of wheat, potatoes, mangolds, peas, beans and so forth grown by ordinary agricultural methods on an ordinary farm and describe those fields collectively as " a garden for the sale of produce." That depends on the true meaning of " garden " in r. 8. The first finding is even more puzzling. How can operations on a garden for the sale of produce be " ancillary " to those same operations, for the words " market garden operations " obviously mean operations carried on in "a garden for the sale of produce" ? I have carefully read the special case more than once, and I am satisfied that the commissioners have decided that the arable land is " garden " merely because of the nature of the produce. They could not, I think, have attached any importance to the cost of labour without some further finding as to the usual cost of labour on a highly mechanised farm using very up-to-date appliances and growing vegetable crops and fruit. Clauson, L.J., uses the words " garden crops " as a description of the crops raised. This, for the reasons I have already given, seems to me, with all respect, to be misleading, for most of them are common farm crops. However, Clauson, L.J., indicates clearly that, if the only reason for deciding that an area is a " garden " is that it is concerned with "garden crops," that would not be sufficient. With that I entirely agree. However, he comes to the conclusion that the commissioners must have had some other reason, because they included in the so-called garden the 16 acres of wheat. As I have already said, a piece of land cannot be occupied from the point of view of income tax both as a farm and as a garden for the sale of produce at the discretion of the commissioners. It must be either one or the other. No facts are stated or suggested in the special case which go to show that the 16-acre field on which wheat was grown was part of a garden, or " ancillary " to a garden, within the meaning of r. 8. The fact that the commissioners thought that they could so describe that area seems to me a further reason for thinking that they were acting on a wrong view of the meaning of the words " nurseries or gardens." In my opinion, it is impossible to define in precise language the meaning of the word "garden" as used in the rule, and I have no intention of attempting the impossible. It is, however, possible to state the general nature of the various characteristics which go to make up such a garden.

I have already pointed out the remarkable contrast between the effect of r. 5 and r. 8 in relation to the scheme of taxation. Next, I think, some weight should be given to the fact that a garden is *prima facie* an area which is enclosed, and it is a little surprising that nothing in the case stated suggests such a separation, except that the whole arable area, including a wheat-field and all the fallow, is regarded as a garden. Then it is to be noted that r. 8 applies only to two kinds of lands—namely, "lands occupied as nurseries or gardens for the sale of the produce (other than lands used for the growth of hops)." Nurseries obviously require a very special kind of cultivation, and it is, I think, a probable conjecture that the legislature, when it in effect took nurseries and gardens for the sale of produce out of the general words of Sched. B, r. 1, did so because in both cases the method of cultivation was not that ordinarily used on a farm. I attribute weight also to the historical considerations which have been mentioned in the judgment of SCOTT, L.J., which reinforce his view as to the meaning which should still be attached to the words now in r. 8. Further, I agree with him that the various Income Tax Acts must have been framed in the belief that nurseries and gardens would normally, at least, have some permanency of character, since the profits of such lands had formerly to be estimated on a three-years' average, and now, under the Finance Act, 1926, have to be estimated on the yield of the preceding year.. Peas, beans and so forth grown on a farm may occupy lands which were occupied during the preceding year by cereals or for grazing. It will be understood that I am only dealing with characteristics of a garden, and am not suggesting that any one of the matters I have mentioned is conclusive.

My Lords, in my opinion, far the most important distinctive quality which differentiates a garden within the rule from a farm taxable under r. 1 is the mode of cultivation employed. It is the character and nature of the operations on the land which mainly determine whether or not it is a garden for the sale of produce. I agree with SCOTT, L.J., that the distinction between farm and "garden" may be expressed in general words as the difference between lands cultivated by agricultural methods and lands on which horticultural methods are employed. Produce which requires the attention of skilled men would generally be found grown in a garden. The use of the plough in such a place would be something of a rarity. The soil in the garden would usually be prepared by the employment of the homely spade and the tiresome operation of trenching and digging in manure. At any rate, I am confident that that was the case when the words "gardens for the sale of the produce" were employed in the early Acts relating to income tax. Certainly, hand-labour would usually be employed, and it would be very unusual to find (as in this case) that the land was for the most part both machine-planted and machine-hoed. It is not altogether irrelevant to note that in the census returns gardeners and nurserymen and "gardeners' labourers" are enumerated separately from "agricultural labourers." The greater care employed in raising vegetables in a market-garden generally results in better shape and quality in the produce. Peas and beans, as I have pointed out, may be grown both on farms and gardens, but they will not usually have quite the same taste and quality.

My Lords, the occupier of a farm carried on as a single unit must *prima facie* be entitled to be taxed as if it were a unit. It is in fact a unit of occupation. As pointed out above, he is entitled, if he pleases, to be assessed and charged under Sched. D, and this must *prima facie* be on the whole of his profits and gains. I think this follows from Sched. D, Cases I and II, r. 16, which provides that his statement of profits must include every source of income, and that he shall be chargeable in respect of the whole of the tax so chargeable in one and the same division. The proviso relates to a person engaged in different trades in different places, which, of course, is not the case here. I am not doubting that there might be, in a proper case, a separation of lands occupied as a garden for the sale of produce from the farmlands, but I am of opinion that the necessity for the separation should be clearly established.

It is desirable to make a few remarks on two of the authorities which have been cited. *Monro & Cobley* v. *Bailey* (3), which was decided by this House, related to a holding of some 200 acres occupied mainly for the purpose of growing bulbs. It seems to me widely different from the present case. Bulb-growing, like flower-growing, is a very special use of land. The method of cultivation is a special one. The main question in the case was whether an area not used for growing bulbs was properly held to be used for a purpose ancillary to the bulb-growing, and it was held that there was sufficient evidence to justify the commissioners in taking that view. I do not think that that case throws light on the present appeal. The other case is *Dennis* v. *Hick* (2). The crops grown were vegetable crops as opposed to cereals, and a small amount of stock was raised, but most of the work on the crops was done by hand—for example, sowing in seed-beds, grading, washing and packing—and the manuring was much heavier than on ordinary farm lands. Moreover, the taxpayer frankly admitted that he carried on the business of a market gardener. FINLAY, J., not without some doubt, held that there was evidence to justify the commissioners in finding that the whole area was occupied as a garden for the sale of produce within r. 8. I will only add with respect that, with the same modicum of doubt, I should have come to the same conclusion. That case can certainly be distinguished from the one before us.

My Lords, I do not wish to be understood as saying that a farmer cannot carry on ordinary farming and at the same time carry on the business of a garden for the sale of produce on a distinct area adjacent to, or situate within, his holding, so that, as regards the latter, he would be taxable under r. 8. I do, however, express the opinion that it is wholly erroneous to select from the area of a farm occupied and worked A in one unit, which is used for raising crops and small fruits predominantly, of kinds grown by farmers all over the country, the land being cultivated by ordinary agriculural methods and by ordinary agricultural labourers working indiscriminately on the whole farm and to give to the selected portion the name of a "garden for the sale of produce." To my mind, B there is no finding of fact in the case stated which justifies such a conclusion. On the contrary, I think that the findings of fact, to which I have more than once referred, lead only to the conclusion that the arable land is part of a mixed farm used for the purposes of husbandry, and cannot be brought within r. 8. For the above reasons, I think C this appeal should be allowed, and I agree with the motion proposed by VISCOUNT SIMON, L.C.

My Lords, I am asked by my noble and learned friend LORD RUSSELL OF KILLOWEN to say that he concurs in the opinion which I have just delivered.

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LORD WRIGHT: My Lords, this appeal comes to your Lordships upon a case stated by the commissioners for taxes under the Income Tax Act, 1918, s. 149, for the opinion of the court. The appellant, who was assessed for the tax, declared his dissatisfaction with the decision of the E commissioners as being erroneous in point of law. The question of law involved is whether the appellant was correctly assessed as occupying lands as gardens for the sale of produce under Sched. B, r. 8 of the Act. His claim is that he ought to be assessed under the general rules of Sched. B as to the whole of the land occupied by him on the footing that F he occupies the whole acreage of about 536 acres for purposes of husbandry—that is, as a farmer—whereas in regard to about 229 acres of these lands (called throughout in the case the arable lands) he has been assessed under r. 8. The remainder, about 307 acres, was made up of 40 arable acres under hops, 82 acres of mowing grass, 178½ acres G of grazing and 7 acres of osiers. On these lands the appellant also kept livestock—namely, 16 horses, 90 cattle, 232 sheep, 1,012 pigs and 8,045 poultry. He was assessed upon them under the general rules of Sched. B. On the 229 acres the appellant grew various crops or produce. Of these, wheat occupied 16 acres, grown partly to obtain the H subsidy payable under the Wheat Act and partly to provide straw litter for the pigs. Mangolds (3 acres), parsnips (6 acres) and lucerne (½ acre) were grown to provide feed for the stock and horses. As these were not grown for sale, they were on that ground, in addition to the fact that their growing was an ordinary farming operation, outside r. 8, because the produce was not for sale. The commissioners held, however, that they were assessable under r. 8, on the ground that the farming operations were ancillary to what they described as "the market-garden operations" carried on upon the remainder of the 229 acres. These, apart from 11½ acres of fallow, were used for growing, as set out in the case, 16 different kinds of crops or produce—namely, potatoes (7 acres), peas (26½ acres), beans (18½ acres), brussels sprouts (44½ acres), savoys (4 acres), cauliflowers (18½ acres), leeks (3½ acres), carrots (4 acres), asparagus (2 acres), plants (5 acres), rhubarb (1 acre), plums (17 acres), blackcurrants (1½ acres), strawberries (32 acres), raspberries (5 acres) and loganberries (2 acres). The conclusions of the commissioners were that the whole of the 229 acres were occupied as gardens for the sale of produce and assessable under r. 8, and that the remainder of the land occupied by the appellant was devoted to farming operations assessable under the ordinary rules applicable to Sched. B. Lawrence, J., held that the acres under wheat, parsnips, mangolds and lucerne were, on the face of the case, outside r. 8, but, as to the remainder, he decided that the decision of the commissioners should be upheld. His own view was that the finding in the special case that the whole acreage was worked as a single mixed farm was inconsistent with the decision to uphold an assessment on one part as gardens and on another as farmlands, because the land, to be assessable as gardens, must be distinct and separable from the farm. He thought, however, that there was some evidence to support the commissioners' finding on the authority of *Lowe (David) & Sons, Ltd.* v. *Inland Revenue Comrs.* (1), where it was held by the Court of Session that the commissioners could apportion the assessment even where lands were held and worked as one unit. In the Court of Appeal, by a majority (Scott, L.J., dissenting) the decision of Lawrence, J., was upheld, except that the court restored the finding of the commissioners as regards the lands which the commissioners found were ancillary to the gardens. Clauson and Goddard, L.JJ., who formed the majority of the court, do, indeed, discuss to some extent the legal effect of r. 8, but in the main, as I read their judgments, they treat the question as one of "fact and degree," on which the finding of the commissioners is final, if, as they thought, there was some evidence to support it. Scott, L.J., in an admirable and exhaustive judgment, with which in substance I agree, held that, on the findings of the commissioners and on the true construction of r. 8, their conclusions could not be supported, and that the appellant should be assessed as to the whole of the lands under the ordinary rules of Sched. B as being a single mixed farm.

The justification for stating an award in the form of a special case for the opinion of the court is that it raises questions of law by which the correctness of the conclusions are to be decided. I think that such questions are involved in the present case. It has been strenuously contended as a main argument on behalf of the Crown that the questions here to be discussed are questions of "fact and degree," but, in my opinion, the true effect of the facts found cannot be ascertained until the true construction of r. 8 has been examined and its true application to the facts ascertained. There are, in addition to incidental questions, two main questions of law—namely, (i) what is the meaning of "gardens for the sale of produce," and (ii) how is that meaning to be applied to an acreage which is worked as a single mixed farm in one unit. This latter point is that on which Lawrence, J., would, if he had felt free to do so, have decided for the appellant, on the footing, as I follow it, that, according to the findings in the case, the whole area of 536 acres is not capable of being split or divided into two separate undertakings, one gardens and the other a farm, but that there is one single agricultural undertaking and that the parts which might otherwise be regarded as gardens are nothing more than parts of a single farming unit.

What, however, is the test by which it may be ascertained what are gardens within r. 8 as contrasted with a farm generally? It cannot be merely that the land is managed for the sale of the produce—that is, to make profits. All that a husbandman grows is for sale, subject, of course, to deducting such produce as is grown for use in connection with other parts of the undertaking (as, for example, in this case, the parsnips and lucerne) or for the use of himself and his family. The farmer is a trader so far as he sells, though, apart from election under r. 5, he is assessed under Sched. B. The specific reference to sale as the object of growing the produce is to distinguish a garden within r. 8 from a private, non-commercial garden, ranging from the cottage garden to the garden of a great mansion, in which the fruit or flowers or vegetables are grown for home consumption or for the pleasure or the pride or the benevolence of the occupier. To distinguish gardening operations in this connection from other agricultural operations to raise produce from the land, there must be some other criterion. Scott, L.J., in his judgment has thrown light on this question by tracing back r. 8 to its first appearance in the Act of 1806, and then, when that Act lapsed, to its re-enactment in 1842. I disregard the special treatment of hoplands. "Nurseries" then, as now, were coupled with "gardens." Scott, L.J., quotes from an interesting work, Middleton's Agricultural Survey of Middlesex, published in 1798. This shows the circumstances which in 1806 obviously were in the mind of the legislature. Middleton distinguished kitchen-gardeners (obviously what we should call market-gardeners) from farming-gardeners. The former occupied smaller holdings, intensively cultivated "by the spade," engaged in supplying London from the outlying villages with fruit and vegetables. The latter had larger tracts of land, worked their soil principally by the plough, and were more distant from London. My noble and learned friend Viscount Maugham has supplemented this information by referring to a report issued by the Ministry of Agriculture of the agricultural output of England and Wales in 1925. In Table 4, p. 128, the report gives the average annual production of the principal farm crops, and includes, along with wheat, barley and oats, beans, peas, potatoes, turnips and swedes. Tables 7 and 8 give the enormous quantities of vegetables and fruit produced in that year in England and Wales—for instance, cabbage for human consumption, 410,000 tons, strawberries, 705,000 cwt. This report shows clearly the enormous scale on which vegetables and fruit are produced. It seems to me to indicate a departure from the intensive or horticultural method prevalent according to Middleton in the smaller holdings about the end of the eighteenth century and an adoption of the methods of cultivation found in the case to have been adopted by the appellant—that is, ordinary agricultural methods (finding (*o*)) which the appellant used. The growth of the population (now mainly urban) and the great facilities for transmission must tend to the use, even in lands occupied as gardens within r. 8, of agricultural methods. Therefore, I do not think that the use of such methods as contrasted with horticultural methods in the stricter sense can serve as a general criterion to distinguish gardening within r. 8 from farming, although that factor may be taken into account in considering whether particular lands are garden-lands as contrasted with farm lands. The nature of the produce raised is no doubt also an important factor, but there again the line cannot be drawn with precision. Garden produce as meant by r. 8 has been described as what is sold in greengrocers' shops, but modern methods and demands have in many cases led to specialised production on a large scale. Potatoes are clearly an ordinary and important part of a greengrocer's stock, but it seems to me impossible to treat a case of cultivation like that illustrated in *Back* v. *Daniels* (4) as gardening in contradistinction to farming. There a large area, about 187 acres, was devoted to potato growing for sale. The question in the case was who was occupier, but throughout, as a matter of course, the operation is referred to as farming or husbandry, and the assessment was under the ordinary rules of Sched. B. This view seems to me to be right. The same must be true, I think, of the raising on a large scale of crops of a particular produce such as cabbages. It does not follow that, because certain produce is grown in gardens, any land on which it is grown is necessarily a garden. The word " garden " is not used in r. 8 in a technical sense. It is an ordinary word, to be understood as in ordinary popular usage. However, whatever else may be included in the word " gardens " in the rule, I think that it cannot be wholly divorced from its root idea of a substantially homogeneous area, substantially devoted to the growth of fruits, flowers and vegetables. The dictionary definitions of " garden " include the idea of its being an enclosed space. Thus, for instance, in the OXFORD DICTIONARY, " garden " is defined as :

> An enclosed piece of ground devoted to the cultivation of flowers, fruit, or vegetables ; often preceded by some defining word, as flower, fruit, kitchen, market, strawberry garden, etc.

I do not say that in modern times gardening operations falling within r. 8 may not be carried on in open fields, but the essential characteristic of the statutory " garden " and the idea material to this case is that it should be, within reasonable limits, a defined unit of cultivation in relation to space. That is not inconsistent with the inclusion in the unit of some lands used at some particular time for other purposes. This is necessary for rotation of crops, but it must be possible to predicate a substantial A and relatively permanent unity of character and purpose. This was so in *Monro & Cobley* v. *Bailey* (3), where this House upheld an assessment of 200 acres, on 60 acres of which bulbs were grown, as a garden within r. 8. However, it was necessary to have the remaining 140 acres in order to carry on the bulb-growing, partly because of the operations B necessary in shifting the bulbs from one area to another and partly for purposes of rotation. Bulbs are clearly a garden crop, and the whole area was necessary to enable 60 acres of bulbs to be grown, even though the remaining acreage was at times used for other crops. That may be described as an easy case, but it is no authority to govern this case. C Indeed, it is in sharp contrast, and illustrates the absence from this case of the factors necessary to constitute a garden. There was there a defined unit of occupation as a garden. Here there is no defined unit of occupation as a garden. On the contrary, the only defined unit of occupation is, according to the commissioners' finding, a mixed farm. D The main area was called Springhill, which covered 508 acres. Within that area, the great bulk of the mixed farming operations were carried on. The accuracy of the statement made by SCOTT, L.J., in his judgment was accepted in argument in this House. He said, at p. 97:

> There is nothing in their [the commissioners'] findings of fact to indicate that the E fields they added together [to constitute the 229 acres which they held to be gardens] were not scattered over the whole holding, so as to be interspersed with mowing-grass or pasture fields. Indeed, it was common ground, as we were informed, that the arable fields were in fact so interspersed.

In my opinion, this state of things is inconsistent with the conception of "gardens." "Gardens" within the meaning of r. 8 cannot be notionally F constituted by picking out from the total area about 16 scattered fields used in the year of assessment for producing fruit and vegetables. It would logically be just as easy to say that, if there were in the middle of the farm lands in a large farm a single field of cabbages, that single field was a garden within r. 8. I do not doubt that in a large holding G there might be two distinct portions spatially severable, one devoted to farming operations and the other to the growing of fruit and vegetables. Each of these separate areas might properly be separately assessed, the one area as a farm under the ordinary rules of Sched. B and the other as gardens under r. 8; but that is a different matter. There is H in that case no intermingling of garden and farm.

The commissioners' conclusion would also involve serious administrative difficulties. There is here no continuity or fixity in the user of any particular field. The particular field used in the year of assessment for growing fruit and vegetables may have been, owing to the ordinary system of rotation of crops, used in the preceding year for ordinary farm purposes. Rule 8 requires the application to the lands coming within it

of the rules of Sched. D, which make the tax payable on the basis of the previous year's income. However, it would be impossible in the case supposed to ascertain the gardening profits of the particular field, or, indeed, of the aggregate of the particular fields, in accordance with the proper methods of computation. This was even more obvious before A
the profits of the preceding year were substituted for the average profits of the three preceding years. It is no answer that in each year the business might be treated as a new business commenced in that year. That would not be in accordance with the fact, and would necessitate complex book-keeping and accounting such as could not be exacted B
from the agricultural community. The difficulty was solved in *Monro & Cobley* v. *Bailey* (3) by treating the whole area as a single unit of cultivation for gardening purposes, but the facts there justified the finding that the whole unit was a garden. Here, for reasons which I have explained, no such finding is justifiable. It is not legitimate to constitute C
a notional garden by claiming to aggregate the *disjecta membra*, the scattered islanded fields, in which fruit or vegetables are grown.

Apart from all these difficulties, however, the matter is concluded, as I think, by para. 2 (*c*) of the case stated, which states as follows :

> The whole acreage occupied by the appellant was worked as a single mixed farm in one unit. The appellant employed ordinary farm-labourers, who were not highly D
> skilled.

The case adds that the workers worked indiscriminately upon the whole farm, whether upon the sheep, pigs, cattle and poultry or upon the pasture and/or the arable land, and that the methods of cultivation were the ordinary accepted agricultural methods. In my opinion, E
these findings mean that there was one unit of cultivation, and that it was a farm. They exclude the idea that the farm was partly gardens, or that there was any division into component or separate parts. I picture the farmer facing the problem of what would be the best use to make of his farm of 500-odd acres from year to year, deciding what F
different kinds of produce or stock would pay best, what rotation of crops requires and how best to apportion his land among the different purposes. Another year, he would have the same problem, and presumably settle it in a different way. Lawrence, J., was of opinion, as I have already observed, that the first finding was inconsistent with a decision to uphold G
an assessment on one part as gardens and on another part as farm lands. I agree with him, and I also agree in taking as an essential criterion of "gardens" in r. 8 that the lands to be characterised as gardens must be distinct and separate from the farm. This was also the view of Scott, L.J. Lawrence, J., was diverted from his own view because H
he felt bound to follow the Scots decision in *Lowe (David) & Sons, Ltd.* v. *Inland Revenue Comrs.* (1), but in that case the taxpayer admitted the possibility of picking out individual separate fields and aggregating them to form notional "gardens." I think the case cannot be supported in principle. The other cases cited do not appear to me to help, and I do not discuss them.

I ought to add, though it is not material in view of my general conclusion, that I should agree with LAWRENCE, J., with reference to that part of the arable lands which the commissioners held to be ancillary to the gardens. LAWRENCE, J., shrewdly observes that he cannot see how these lands were ancillary to the gardens any more than the other lands used for feeding stock, which, indeed, was exactly what these lands were used for. I ought also to add that the case of woodlands and hoplands stands on a different footing, as also does glasshouse cultivation. In my opinion, the appeal should be allowed.

LORD PORTER: My Lords, the short question in this appeal is whether a portion of the appellant's land can rightfully be severed from the rest and classed as land occupied as a garden for the sale of the produce. If it can, under the Income Tax Act, 1918, Sched. B, r. 8, its profits are to be assessed and charged under that schedule as profits arising from the occupation of land, but they are to be estimated according to the provisions and rules applicable to Sched. D—that is, not upon the annual value of the land, but upon the profits derived from it. If it cannot, then the charge is normally made in respect of the occupation of the land for every 20*s*. of the assessable value—that is, in the case of land used for husbandry, upon the annual value of the land without regard to the profits made, save in so far as they affect its assessable value. The reason for the differentiation is agreed by both parties to be due to the much greater amount of profit expected to be earned proportionately to the acreage occupied in the case of lands occupied as gardens compared with that expected when they are used for husbandry or other purposes. The distinction goes back to the period at which income tax was imposed in 1806, when not dissimilar language was used, and to the renewal of the tax in 1842, when the language was almost identical with that now in use.

Under r. 8, hop-gardens are now, after some changes in the law, left to be dealt with under the ordinary provisions of Sched. B, and, under rr. 5 and 7, lands occupied for the purpose of husbandry and woodlands managed on a commercial basis and with a view to the realisation of profit may, at the option of the occupier, be assessed under Sched. D instead of under Sched. B. In the present case, the lands the subject-matter of the dispute form part only of the appellant's holding. The Crown maintains that they are properly severable from the rest and chargeable under r. 8 as lands occupied as gardens for the sale of produce. The appellant maintains that, having regard to the facts of the case, they cannot be disassociated from the rest of the land, and, in any case, are not such gardens.

The commissioners to whom the question was referred found that the lands could be divided, and that the whole of the arable land occupied by the appellant (apart from that occupied for the growth of hops) was occupied as gardens for the sale of produce, but stated a case for the opinion of the High Court. LAWRENCE, J., before whom the case was argued, upheld the findings of the commissioners (subject to a slight modification), but, as I gather, with some reluctance. If he had not felt himself bound by authority, he would have decided that no division was permissible, and, though he thought that there was some evidence A on which the finding that the arable portion was a garden could be supported, and, therefore, did not feel justified in differing from the commissioners, he would, if left to himself, have found the other way. In the Court of Appeal, SCOTT, L.J., disagreed on both points, but CLAUSON and GODDARD, L.JJ., thought both were questions of fact and degree, B and, inasmuch as, in their view, there was some evidence upon which the commissioners could base their findings, affirmed the decision.

I did not understand the appellant to seek to establish that in a proper case a holding could not be divided into two portions, one of which was occupied as a garden (for brevity's sake I omit the words "for the C sale of produce") and the other not so occupied. Nor do I think he would be right if he did. Provided it is clearly shown that one part of the land is so occupied and there is a definite separation in the method of working, I see no reason why the two portions should not be separately assessed, and, speaking for myself, I think this conclusion might be D arrived at though the portions separately worked were not divided into two continuous parts, but were made up of broken portions of the area. In the latter case, however, it would, I think, require very clear evidence that the working and method of working of the part classified as a garden differed from that of the other portion of the lands. The appellant E did, I think, contend that in no case was it permissible to deduce the conclusion that the land was occupied as a garden solely from the type of crop grown, *i.e.*, from the fact that it was what the representatives of the Crown described as garden produce. Again, speaking for myself, I think that, if substantially the whole of an undivided holding contained F little save such crops as are as a rule grown only in gardens, and in particular if a mixed crop consisting substantially of garden produce was shown to be cultivated on the land, there would be evidence on which the commissioners could find that the land was occupied as a garden. However, the fact that part of the land was so used would not entitle G them to split up that portion and call it a garden, nor, even if no splitting were required, would it be legitimate to rely upon the fact that the produce was such as might be grown on farms or gardens. An inference cannot be drawn from the growth of a crop of doubtful classification.

If I were asked to state the most material matters to be looked at in H determining whether a particular portion of land was occupied as a garden or no, I should lay stress on (i) the unit to be considered, i.e., whether the whole land was worked by the same methods and the same staff, or whether there was some clear distinction in its treatment; (ii) the method of cultivation, *i.e.*, whether or not it was intensive and under skilled labour; (iii) what crops were grown there; and, I think (though its importance is slight), (iv) the size of the unit. That the cultivation was effected by mechanical means would not, I think, provided it were proved to be intensive, make it impossible to hold that the land was occupied as a garden. Methods of cultivation change, and what at one A time can only be accomplished by the spade may at another be brought about by some mechanical substitute. Even so, however, the large-scale operations of a farm are still likely to be distinguishable from the more individual cultivation of a garden crop. Some continuity of treatment is also, I think, predicated. No doubt a garden must be begun at B some time, and the fact that it has only just been brought into being will not prevent it from being a garden, but income tax under or in accordance with the principles of Sched. D is chargeable upon the profits of the year to come, now estimated by the profits of the year before, and formerly upon the average profits of the three previous years. It C is inconsistent with such a provision that land should in one year be regarded as occupied for husbandry and the next as a garden merely because the crops vary from year to year. No doubt, if land as a whole is occupied as a garden, it is immaterial that it is found advisable in the ordinary rotation of crops to grow farm produce from time to time D on a portion, just as, if land as a whole is occupied for husbandry, it, or a portion of it, does not become a garden because garden produce is cultivated from time to time on some part of it. It is the cultivation as a whole that is to be looked at, and not its temporary variations.

These principles are, I think, consistent with the decided cases. In E both *Monro & Cobley* v. *Bailey* (3) and *Dennis* v. *Hick* (2), the whole of the land occupied was found to be occupied as a garden because substantially that was its use, though in *Monro & Cobley* v. *Bailey* (3) a much larger acreage was cultivated in order that the room necessary for the replanting of bulbs might be available. In *Dennis* v. *Hick* (2), F the portion not used for gardening purposes was found to be merely ancillary to the part so used, by which I understand it to be meant that the additional portion was worked with the garden as one unit because it was convenient to do so. In neither case was the finding dependent on the crop alone. In *Monro & Cobley* v. *Bailey* (3), the crop G was bulbs (which is not a usual crop in ordinary husbandry) sold for replanting. The profit was made largely from them and their flowers. In addition, the cost of labour was much in excess of that employed on ordinary farming operations. In *Dennis* v. *Hick* (2), the cost of labour per acre far exceeded that of a farm. Much heavier manuring took H place, and much of the work on the crop, both when growing and after picking, was done by hand. *Lowe (David) & Sons, Ltd.* v. *Inland Revenue Comrs.* (1) was the only case quoted to us of splitting up of land in the same occupation, and was the case which the judge thought himself obliged to follow in deciding in favour of the Crown. I refrain from expressing an opinion whether or not the commissioners were in that case rightly held to have had such material before them as entitled them to decide that the divided portion was a garden. The decision seems in part to have turned upon an admission of counsel, and, as appears from the opinion of LORD CARMONT, the question of splitting was not argued. The case therefore affords no authority on that matter.

It only remains to apply these considerations to the present case. *Prima facie*, the unit was the whole farm. Findings (*c*), (*d*) and (*o*) of the case are as follows :

> (*c*) The whole acreage occupied by the appellant was worked as a single mixed farm in one unit. The appellant employed ordinary farm-labourers, who were not highly skilled. (*d*) The appellant used very up-to-date appliances and practised mechanised farming over the whole farm. The minimum of hand labour was used in producing crops upon the arable land, much of it being machine-planted and machine-hoed . . . (*o*) The methods of cultivation were the ordinary accepted agricultural methods.

Those findings show that the farm was so worked. That the stock keeping was no merely ancillary activity is shown by the value and amount of the stock and the magnitude of the sums derived from its sale. Each activity was an important one, and each assisted the other. That the labour was not highly skilled and that ordinary agricultural methods were used might, I think, support an argument that the appellant was a farmer, but afford no reason for dividing up his holding. Except the nature of the crop and the fact that part was arable and part pasture, the only difference between the two portions appears to be that a heavier expenditure was incurred for labour on the arable than on the other, and that, to my mind, is not enough, even though I accept as accurate the statement in (*k*) that the cost of labour over the whole farm was £12 per acre and over the land upon which fruit and vegetables were grown £18 per acre, a statement which appears to be inconsistent with the allegation in (*j*) that the wages for the year amounted to £9,684 17*s*. 10*d*., a figure which makes wages over the whole area amount, not to £12 per acre, but to £17 12*s*. per acre. Even if splitting were justified, I should have difficulty in holding that the divided portion was occupied as a garden. The only evidence is derived from the crop, the fact that part was sold through an agent, and the fact that supplies were sometimes obtained from other growers. Many of the crops are such as might be grown either on a farm or in a garden.

If there had been a finding that a substantial portion of the crop was such as in the district was grown in gardens only, and not on farms, the conclusion that the arable was occupied as a garden might be justified, at any rate, on an undivided farm, but, to my mind, it is not enough for facts to be set out which do not of themselves (apart from circumstances which may possibly exist and be known to the commissioners to exist) point to a conclusion either way, and then to have a finding of fact from those inconclusive matters. There may, it is true, be other facts justifying the conclusion, but your Lordships, like any other tribunal to whom the case is referred, are bound to consider only the facts found. It seems to be not unusual, if my examination of the cases is accurate, for commissioners, after stating the facts, to say that they come to a certain conclusion and accordingly find such and such a thing as a fact. I do not think this is justifiable. The final result is not a fact. It is an inference from facts previously set out. I should prefer the commonplace of the legal arbitrator: "So far as it is a question of fact, I find as a fact, and, so far as it is a question of law, I hold." However, this is a matter of form rather than substance. In the present case, my view is that the splitting up of the holding for tax purposes was not justified, and there was no evidence on which the commissioners could find that the portion which they so notionally divided from the rest was occupied as a garden for the sale of produce. I should allow the appeal.

Appeal allowed with costs.

Solicitors: *Ellis & Fairbairn*, agents for *Ryland, Martineau & Co.*, Birmingham (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

GOODCHILD *v.* WELLBORNE.

[KING'S BENCH DIVISION (Croom-Johnson, J.), **March 24, 25, 1941.**]

Gaming—Unlawful games—Poker—Gaming-house conducted by company—Sale of shares—Contract founded on illegality—Gaming Act, 1845 (*c.* 109), *s.* 2—*Gaming Houses Act*, 1854 (*c.* 38), *s.* 4.

The plaintiff was the sole director of D. P., Ltd., a company which had been formed to take over the business of the D. Club. Bridge and various kinds of poker were played at the club and revenue was also received from the running of a bar. The defendant had, at a previous date, been a hostess at the club, and had occupied a flat above it. She was fully cognisant of the nature of the club's business. In Feb., 1940, the plaintiff and the defendant entered into negotiations which culminated on May 7, 1940, in an oral agreement by which, in consideration of the payment of £400 by the defendant, the plaintiff agreed that 200 £1 shares in the company, which he was entitled to have allotted to him, should be allotted instead to the defendant. It was also agreed that the defendant should act as manageress of the club at a salary of £5 per week, and should resume occupation of her former flat. On May 8, 1940, a share certificate for 200 shares was handed over to the defendant in return for which she gave the plaintiff a cheque for £400 postdated May 9, 1940. The defendant then changed her mind, stopped payment of the cheque and returned the share certificate. The defendant contended that the cheque was given for an illegal consideration. The plaintiff contended that the court was not entitled to go behind the share transaction in order to see what was the nature of the business carried on by the company:—

Held: since, prior to the date of the agreement, the business of the company had been concerned, to some extent at least, with occupying premises for the playing of unlawful games, it could only be concluded that the intention of the parties was that the business should be carried on in the same way in the future. The agreement was not, therefore, a mere bargain to buy shares in a company, but was, in fact, an agreement with reference to the carrying on of an unlawful business, and the plaintiff's claim must be dismissed as an attempt to enforce a contract founded on illegality.

[**EDITORIAL NOTE.** An agreement with reference to the carrying on of a gaming-house is here held to be given for an illegal consideration notwithstanding that the transaction is concerned with the sale of shares in the company which conducts the gaming-house. From the terms of the agreement it was clearly the intention of the parties to provide for the carrying on of an unlawful business and the agreement was, therefore, one which the court must refuse to enforce.

As to Unlawful Games, see HALSBURY, Hailsham Edn., Vol. 15, pp. 501, 502, paras. 904, 905; and for Cases, see DIGEST, Vol. 25, pp. 423-425, Nos. 260-270.]

Cases referred to:

(1) *Dalton* v. *Adelphi Club*, [1938] 4 All E.R. 556; Digest Supp.; 160 L.T. 14.

(2) *Jenks* v. *Turpin* (1884), 13 Q.B.D. 505; 25 Digest 423, *260*; 53 L.J.M.C. 161; 50 L.T. 808.

Action upon a cheque for £400, dated May 9, 1940, drawn by the defendant, Mrs. Mary Wellborne, on Thos. Cook & Son (Bankers), Ltd., in favour of Sidney George Goodchild, the plaintiff. In due course the cheque was paid into the plaintiff's bank and returned to him marked "Orders not to pay, May 14, 1940." On May 20, 1940, the plaintiff issued his writ in this action claiming payment of the cheque in question. The defendant contended that the cheque was given for an illegal consideration.

The plaintiff ran a bridge and poker club, known as the Deanery Club. On Jan. 11, 1940, he formed a private limited liability company called Deanery Properties, Ltd., to take over the club. The nominal capital of the company was £500 divided into 500 shares of £1 each. The plaintiff was to be the sole director and was to hold 251 shares and his brother, Frederick Douglas Goodchild, 249 shares. From February, 1940, onwards, the business of the company consisted of carrying on the Deanery Club. At about this time some negotiations with reference to the club took place between the plaintiff and the defendant, and in the course thereof the defendant was given the opportunity of making such investigations into the affairs of the club as she thought fit. These negotiations came to nothing and the parties then entered into negotiations to carry on the club on a "partnership" basis. The defendant had at an earlier period been a hostess at the club and had lived in a flat over the club premises. She knew that bridge and various kinds of poker were played on the club's premises, and she was also aware that the club derived part of its revenue from running a bar. On May 7, 1940, an oral agreement was made between the plaintiff and the defendant by which the defendant was to purchase 200 shares in the company for the sum of £400 in return for which she was to receive £5 per week as manageress of the club and was to have the use of her former flat over the club premises. The 251 shares and the 249 shares proposed to be issued to the plaintiff and his brother respectively were in fact never allotted, but by a resolution of directors on May 7, 1940, it was resolved that 200 of the shares formerly resolved to be issued to the plaintiff should be allotted to the defendant and that a further 200 shares should be allotted to the plaintiff. The plaintiff's brother had by this time ceased to take any interest in the company. A certificate for 200 shares in the defendant's name was issued on May 7, 1940. This was handed over to her on May 8, 1940, and in return the plaintiff received the cheque now sued upon. It was postdated May 9, 1940, and was not presented to the bank for collection until about May 14, 1940. Meanwhile the defendant changed her mind and stopped payment of the cheque. On May 15, 1940, she wrote to the plaintiff returning the share certificate and advising him that she had stopped payment of the cheque, whereupon the plaintiff brought this action.

Gerald A. Gardiner for the plaintiff.

H. G. Garland for the defendant.

CROOM-JOHNSON, J. [after stating the facts]: The defendant relies upon the defence that this was an illegal transaction. As framed in the defence, I do not think that the suggestion which is made there anywhere approaches what the transaction really was. It reads as follows:

> The said cheque was given for an illegal consideration, viz., for the price of a half-share in a gaming-house business carried on by the plaintiff under the style of the Deanery Club, and the transaction was contrary to public policy.

The cheque was not given for the price of a half-share in a gaming house. It was given as consideration for the sale of shares, the right to occupy a flat and the appointment as manageress of the club. The parties were not dealing with a business carried on by the plaintiff at all. The business was not carried on by the plaintiff at any material time. It was carried on and was owned by the limited liability company and I am quite unable to follow why that transaction can be said to be contrary to public policy.

Unfortunately, however, that does not dispose of the matter. The true transaction here was one for the sale and purchase of shares in a company whose sole business was that of carrying on a club, and it is agreed that, if the court comes to the conclusion that the true nature of the transaction is that these parties were intending to carry on together in some form or another some illegal transaction, quite apart from pleading, it is the duty of the court to take the point, and to refuse to permit the court to be used as a means of either enforcing or carrying out a transaction which is illegal. The interesting question which arises here on that aspect of the case is this. This was a sale and purchase of shares, where the business of the company was one which was illegal, although it was capable of being carried on legally if the parties in control of the company so decided, but where the parties in control of the company intended to carry it on illegally. Was the transaction with regard to the sale and purchase of shares for that reason unenforceable, or one which the court should not enforce ? I do not think that there is any question about it, and counsel for the plaintiff has accepted the position that, had these two parties decided together to enter into partnership to carry on a business which was illegal, neither of them could recover against the other, even if the consideration on the one side was an executed consideration, and, further, that, if the two parties, having agreed to enter into a partnership of that sort, came to the conclusion that it would be convenient that they should do so through the means of a company to be registered for the purpose under the limited liability laws, there would be no distinction to be drawn by reason merely of the fact that it became in that sense a transaction in shares. However, the point which is submitted for decision here, as I gather, is this. Assuming that the business is an illegal business, it is suggested that, where the company is already existing, and where it is possible, in certain events, to transact the business of the company legally and lawfully, the court then must say : "This is a mere transaction in shares. You have had the shares, and you must pay the money which you owe in respect of those shares." In order that I may determine that, it is necessary first of all to examine the precise facts as to the company which owned the business, and as to the business which it was carrying on. The premises consisted of a number of rooms. There were upon the ground floor a kitchen and a bar, as well as other offices of various sorts. There was upon the first floor a bridge room, and on a half-floor there was an office, while on a half-floor above that there was a poker room, and, above that, a flat. The total number of frequenters of this club was between 200 and 300 people. I assume although it has not been proved, that the premises were registered as a club under the Licensing Acts. There were 40 subscribing members, who subscribed £1 1*s*. per annum. It is not suggested that the profits of the club belonged to the members. They belonged to the limited liability company. The people making up the difference between the 40 subscribing members and the 200 to 300 frequenters were described as honorary members, which sounded to me like driving a coach and horses through the provisions of the Licensing Acts so far as the liquor consumed on the club premises was concerned.

The election of the honorary members apparently took this form. A member could nominate another member, but whether that was confined to subscribing members or to honorary members, or whether it included both, I do not know. I assume that somebody seconded each nomination, no doubt in order to see that, socially at all events, the people who frequented this club were of the right sort, possibly possessed of a sufficient amount of money to enable them to be of utility in a bridge or poker club. The so-called election was a mere travesty of that term. What actually happened was that the plaintiff and the secretary together decided whether the individual proposed by one member and seconded by another should be allowed to come to the club as a so-called honorary member. I speculated, at the time when I heard that, as to what would have happened if the secretary had insisted and the plaintiff had refused. It is quite obvious that this was a mere device to allow people to frequent this place called a club, but with very dubious legality indeed with regard to the licensing laws. What did people do when they got there ? I am told that most of the takings of the limited liability company in the club consisted of the receipts at the bar, and I can well understand that people who were desirous at least of playing poker might find it more entertaining if the space at their elbow were not empty. They played poker of various sorts. They played what has been described as ordinary poker, which in the end resolved itself into betting on cards. They played what is known as a jack-pot (which merely means that, before people can start the round, somebody has to hold the requisite qualifications in his hand), or an ace-pot, which is the same sort of thing or stud poker. At stud poker, two cards were dealt face downwards to each player, who looked to see his cards. If he decided to go on, he proceeded to have another card dealt. Then he looked again, and then the betting commenced. Whether or not there is an element of skill in the game of poker, or whether there is largely an element of bluff in it, I do not know, but I am quite certain that the predominant element in it, lawful or unlawful, pleasurable or not, is that of betting on one's hand and hoping that the other fellow has not anything so good as one's own, or that one can bluff him out of holding on to the game until such time as the show-down comes and one produces one's own hand when the other man asks to see it. All that is done on the basis that the game is largely one of backing the value of the cards which the chance of the deal has put into one's hands. This is a variety of stud poker. It does not seem to be the same kind of stud poker as that which was the subject of a decision of the King's Bench Division in *Dalton* v. *Adelphi Club* (1). On the facts of that case, the Divisional Court came to the conclusion that, whatever degree of skill an experienced player of this game may acquire, the game always remains a game of chance, and is, therefore, an unlawful game within the Gaming Houses Act, 1854, s. 4. However, I think that I am bound by the often-cited observations of HAWKINS, J., in *Jenks* v. *Turpin* (2). He deals with games of skill, and, after referring to certain games mentioned in earlier statutes, he says, at p. 524 :

> Since that statute the only games made unlawful by 33 Hen. 8, c. 9, are games of dice or cards, whether such games were known at the time of the passing of that statute or have been since invented. All such games, if they are games of chance, or games of chance and skill combined (which cannot be called games of mere skill), are in my opinion, clearly within the meaning of the words unlawful games in the Gaming Houses Act, 1854. The language of 8 and 9 Vict. c. 109, s. 1, in referring to 33 Hen. 8, c. 9, and repealing only so much of it as applies to games of skill, is a strong indication of the intention of the legislature that all the other games mentioned in the statute of Hen. 8 were to continue to be treated as unlawful in the sense in and to the extent to which they were made unlawful by that statute, viz., unlawful if played in a house kept for playing at them. The unlawful games, then, are now ace of hearts, pharaoh, basset, hazard, passage, roulette, every game of dice except

> backgammon, and every game of cards which is not a game of mere skill ; and, I incline to add, any other game of mere chance.

It looks to me, therefore, as if, upon that, coming to the conclusion, as I do, that the element of chance is a predominating element in the game as habitually played at this place, and for the purpose of playing which people did resort to this place, this place was being conducted for the purpose of playing an unlawful game, and the parties meant that state of things to continue. That was the whole object of this agreement. They were not going to carry on some other club. They were going to carry on this club. They were going to work together and to take over, through the company, the goodwill of the members and honorary members who were resorting thereto, with the object and intention that those who were so minded should come to that place for the purpose of playing poker. Some of them, no doubt, wanted to play bridge, but, as I understand the law, if people are there playing an unlawful game, and habitually resorting to that place for the purpose of playing an unlawful game, such lawful games as they may play there become thereby unlawful.

What, then, is the position ? I think that somebody or other was engaged in conducting a house and there was an offence at least against the Gaming Act, 1845. The evidence of the games played at that house, in default of other evidence under that statute, is sufficient to prove that. I think that the purpose of this place was to carry on this unlawful gaming. I have no doubt at all that this was a gaming house.

As I understand it, there may have been a difficulty with regard to the company as to whether the company could be prosecuted under the statute for keeping this place, but the manager of it, the owner, if an individual, certainly could be prosecuted, and so could any person who kept, managed or directed the house. What was the intention of the parties to this contract ? In the case of a house which was being conducted in this way, I think that the only possible inference is that it would be conducted in this way in the future, and that the person who was going to manage and conduct it in future was to be the defendant, because the plaintiff was going to leave her in control of it.

With regard to the question of the shares, I think that this is not a mere bargain to buy shares in a company which is in truth and in fact carrying on an unlawful business, or doing unlawful acts in the course of carrying on an otherwise lawful business. I think this bargain must be looked at as a whole. I must look to see what the history of the business was. It was the company's only business. The company had never had any other business, and the business was apparently always carried on in the same way. I can see no explanation why, if it is wrong to enter into a bargain of this sort to carry it on in partnership or to set it up and carry it on in future through the medium of a limited liability company, it can be right merely to take an existing limited liability company with an existing illegal or unlawful business and then say : " This is a transaction only in reference to the

shares." Justice, I think, would indeed be blind if I found myself forced to say that I must regard this as only a transaction to buy 200 shares in Deanery Properties, Ltd., and shut my eyes to what it was that the parties, I am convinced, were meaning and intending to do in the
A future, as they had done in the past, to the knowledge of both of them, with regard to the business of this concern.

In those circumstances, it seems to me that, as the defendant has chosen to rely upon this point, I must give effect to it. She has not only changed her mind in the course of this transaction. She also appears not in-
B frequently to have changed the basis of the defence which she has desired to advance against the claim on her own cheque. In those circumstances, I think that there must be judgment for the defendant. However, this case has been dealt with in a way which makes me think that I shall do justice if I award no costs to either side. There was a plea of fraud, and
C I have had a doubt whether I shall not order the defendant to pay the costs of that plea. It is quite plain that the defendant herself never thought that she had been defrauded. She swore an affidavit under R.S.C., Ord. 14, it is true, advancing something of the sort, but the truth of the matter was that she thought that, to use her own expression, the
D contract had not been ratified, by which I suppose she meant that there was nothing in writing, and that she had changed her mind. How it came about, on the material which I have seen, or which is available, that the plea of fraud was placed on record in this case is something which I do not understand, but I think that the right order to make in
E this case is that there should be no costs.

Judgment for the defendant, without costs.

Solicitors: *P. R. Kimber* (for the plaintiff); *Lindus & Hortin* (for the defendant).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION.

[Privy Council (Lord Atkin, Lord Thankerton and Lord Romer, and Clauson and Luxmoore, L.JJ.), **February 20, 24, 25, 26, April 28, 1941.**] A

Privy Council—Ontario—Compulsory purchase—Compensation for railway—Interest—Arbitration—Claim for interest on money awarded—Right of action—Petition of right—Niagara Falls Park Act, (S.O., c. 13 *of* 1887)—*Niagara Falls Park and River Railway Company Incorporation Act,* 1892.

The appellants claimed interest on the amount of compensation representing the value of their railway taken over by the respondents, such B interest being claimed from the date when the respondents took possession of the railway until the date of payment of the amount of the award by a board of arbitrators. Possession of the railway was taken by the respondents on Sept. 12, 1932, although, by arrangement between the parties, this was to have been considered as the time when it should have been taken—namely, Sept. 1, 1932. The amount of compensation although fixed as at Sept. 1, 1932, was not finally determined until C Apr. 23, 1937. No interest was included in the award for the reason that the duty of the arbitrators was only to ascertain the actual value of the railway at a certain time, and that the right to interest, if any, was a matter outside the scope of the arbitration. It was contended that, if the appellants were entitled to interest, their only remedy was by way of petition of right against the Crown. The compensation was claimed under an agreement entered into by the defendant commission on its own D behalf as well as on behalf of and with the approval of the Government of the Province of Ontario. This agreement, made in 1891, was in 1892 by an Act of the Legislature of Ontario approved and ratified and declared to be valid and binding on the parties thereto:—

Held: (i) the appellant company's action against the commission was competent, and the commission was properly sued under the 1891 agreement. E

(ii) the general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid was well established, and their Lordships were not aware of any circumstances which would prevent that principle from applying in the present case. F

[**EDITORIAL NOTE.** In considering whether the commission can be sued or whether the only remedy is by petition of right, their Lordships point out that the commission was a corporate body with express power to sue and to be sued. Further, the agreement for the construction of the railway stated that it was made by the commission on its own behalf as well as on behalf and with the approval of the Government of the province. Upon the construction of the agreement their Lordships took the view that the Commission was liable for its fulfilment and could be sued as a legal entity having contractual capacity separate from the Crown. G

As to Interest on Purchase Money, see HALSBURY, Hailsham Edn., Vol. 29, pp. 339, 340, para. 457; and for Cases, see DIGEST, Vol. 11, pp. 231, 232, Nos. 1203-1215.]

Cases referred to: H

(1) *Toronto City Corpn.* v. *Toronto Ry. Corpn.*, [1925] A.C. 177; Digest Supp.

(2) *International Ry. Co.* v. *Niagara Parks Commission*, [1937] 3 All E.R. 181; Digest Supp.

(3) *Gilbert* v. *Trinity House Corpn.* (1886), 17 Q.B.D. 795; 13 Digest 274, *41*; 56 L.J.Q.B. 85.

(4) *Birch* v. *Joy* (1852), 3H.L.Cas. 565; 40 Digest 198, *1656*; *varying* (1848), 12 L.T.O.S. 365.

(5) *Ex p. Manning* (1727), 2 P. Wms. 410 ; 40 Digest 197, *1641*.
(6) *Twigg* v. *Fifield* (1807), 13 Ves. 517 ; 39 Digest 131, *246a*.
(7) *Dakin* v. *Cope* (1827), 2 Russ. 170 ; 40 Digest 195, *1634*.

APPEAL by the railway company from a judgment of the Court of Appeal for Ontario, dated Oct. 31, 1939, affirming a judgment of the Supreme Court of Ontario, which dismissed the appellant's action. The facts are fully set out in the judgment of their Lordships delivered by LUXMOORE, L.J.

D. N. Pritt, K.C., and *J. Leonard Stone* for the appellants.

C. T. Le Quesne, K.C., and *Frank Gahan* for the respondents.

LUXMOORE, L.J. : On Aug. 29, 1938, the International Railway Co. (hereinafter called the appellant company) instituted an action in the Supreme Court of Ontario against the Niagara Parks Commission (hereinafter called the commission) to recover $227,538.22 representing the unpaid balance of $251,322.08 claimed to be due in respect of interest at 5 per cent. per annum from Sept. 1, 1932, to June 3, 1937, on a capital sum of $1,057,436. The action was heard by KELLY, J., who dismissed it and ordered the appellant company to pay the costs. The appellant company appealed from this order to the Court of Appeal for Ontario. The appeal was heard by RIDDELL, MCTAGUE and GILLANDERS, JJ.A., who dismissed it with costs. On Dec. 19, 1939, MCTAGUE, J.A., admitted an appeal by the appellant company to His Majesty in Council.

The trial judge dismissed the action of the appellant company on two grounds—namely, (i) that the appellant company was not entitled to any interest in respect of the capital sum, and (ii) that, even if the company was entitled to interest, the appellant company's only remedy was by petition against the Crown. The Court of Appeal for Ontario affirmed the decision of the trial judge on both grounds. The appellant company submitted before this Board that the decisions of the trial judge and of the Court of Appeal for Ontario were wrong on both points.

The material facts are as follows. By an Act of the legislature of Ontario intituled " An Act respecting the Niagara Falls Park " (Statutes of Ontario 50 Vic. c. 13), three persons therein named who then constituted an unincorporated body known as the Board of Commissioners for Niagara Falls Park with two other persons to be appointed by the Lieutenant-Governor in Council were incorporated under the title of Commissioners for the Queen Victoria Niagara Falls Park for the purpose of establishing, maintaining, improving and developing certain lands selected by the commissioners, thereby constituted as a public park to be called the Queen Victoria Niagara Falls Park. The lands referred to were approved by the Lieutenant-Governor, and by the last-mentioned Act were vested in the commissioners as trustees for the province. The Act conferred on the commissioners the necessary powers enabling them to perform the duties thereby imposed on them, the majority of such powers being subject to the control of the Lieutenant-Governor in

Council. These powers included one to raise a limited sum of money by the issue of debentures charged on the revenues of the commissioners. It was expressly provided that the debentures so issued might be guaranteed by the Crown by order in council.

On Dec. 4, 1891, an agreement was entered into between the Commissioners for the Queen Victoria Niagara Falls Park, who are therein expressed to be acting " on their own behalf as well as on behalf of and with the approval of the Government of the Province of Ontario " of the first part, and three gentlemen who were the promoters of the railway the subject-matter of the agreement, and are, with the company thereafter to be incorporated therein, called the company, of the second part. The agreement (hereinafter referred to as the 1891 agreement) contained recitals to the effect that the company desired to construct and operate an electric railway along the top of the west bank of the Niagara River, that the company intended to apply for a charter of incorporation to enable it to construct and operate the railway and other works therein specified, and to execute effectively the engagements entered into therein on the part of the company, that the company desired to secure the rights of way to construct the railway through and in the Queen Victoria Niagara Falls Park the property of the commissioners and through and over other lands of the commissioners, and also through and over lands held or contracted for by the commissioners under contracts with, and licences from, the owners thereof respectively.

By the operative part of the 1891 agreement (cl.1) the commissioners licensed the company to construct an electric railway in and through what is described as " the park proper" and on and over other lands of the commissioners, some of which are defined as " the chain reserve." The phrase "the park proper" is defined in the agreement to mean the Queen Victoria Niagara Falls Park. The agreement by cl. 2 requires that the company shall construct, equip and operate the railway and shall extend the same to Chippawa Creek, which is not within the limits of the park proper as defined by the agreement, with sufficient sidings and equipment to meet the development of traffic. By cl. 15 the company undertook to build the railway in every respect fit for traffic not later than Sept. 1, 1892. By cls. 16, 17, 18 and 19 the company's right to operate the railway was to begin on Sept. 1, 1892, and was to extend to a period of 40 years from that date, at an annual rental of $10,000, with an option to the company to extend the right for a further period of 20 years at an increased rental if demanded by the commissioners, to be fixed by arbitration if the parties should be unable to agree. By cl. 26 it was provided that, if at the end of the period of 40 years the company was unwilling to renew, or at the end of the further period of 20 years if the company continued to hold for such further period, the company should be duly compensated by the commissioners for their railways, equipment, machinery and other works, but not in respect of any franchises for holding or operating the same, such compensation to be fixed by mutual agreement, or, in case of difference, by arbitration as stated in the agreement, but the failure before the expiration of any such term to fix or pay the compensation was not to entitle the company to retain possession meanwhile of the railways, equipment, machinery and works. Clause 29 provided as follows:

> Subject always to the terms and provisions of this agreement, and to the rights of the commissioners as the owners in fee simple of land over which the right of way in the park proper and on the chain reserve, the said railways and their equipment and the other works constructed or required under this agreement, shall upon such construction or acquisition, as the case may be, be vested in and shall be the property of the company who shall, subject as aforesaid, be entitled to operate, manage and control the same during the period or periods respectively abovementioned, it being however hereby declared, understood and agreed, that at the end of the said first or second periods, as the case may be, the whole of the company's said high level railway from Queenston to Chippawa, and the said low level railway, if then held by the company under this agreement, together with their equipment and the machinery and works aforesaid, including the elevators or lifts acquired or built and including also the works in Queenston and Chippawa shall become the property of the commissioners, subject to the payment of compensation to be agreed upon or awarded as the case may be, and as is hereinbefore provided for.

On Apr. 14, 1892, the Act referred to in the 1891 agreement was passed by the Legislature for Ontario. It is intituled "An Act to Incorporate the Niagara Falls Park and River Railway Co." The preamble contains a recital to the effect that the Commissioners of the Queen Victoria Niagara Falls Park, acting on their own behalf as well as on behalf and with the approval of the Government of the Province of Ontario, on Dec. 4, 1891, entered into the 1891 agreement which is set out in Sched. B to the Act. By sect. 1 of this Act, the 1891 agreement was approved and ratified and declared to be valid and binding on the parties thereto, each of whom was thereby authorised and empowered to do whatever was necessary to give effect to the substance and intention of the agreement, and was thereby declared to have had power to do all acts necessary to give effect to it. By sect. 2 the Niagara Falls Park and River Railway Co., being the company referred to in the 1891 agreement, was incorporated, and by subsequent sections the necessary powers were conferred on this company to enable it to carry into effect the 1891 agreement, including such powers as were necessary for the construction and operation of the railway, the purchase of lands for any of the company's purposes and the sale and conveyance of surplus lands. The company incorporated by this Act duly acquired the necessary lands and built the railway. Subsequently the railway so constructed and the lands so acquired, together with all rights and liabilities of that company, became vested in the appellant company. By a further Act of the Legislature for Ontario passed in 1927 (17 Geo. V c. 24 re-enacted in the Revised Statutes for Ontario, 1927, c. 81), it was provided that the body corporate theretofore constituted by the name of the Commissioners for the Queen Victoria Falls Park should be continued and should thereafter be known as the Niagara Parks Commission, and it is by this name that the corporation was sued by the appellant company, and it is herein referred to as the commission.

The railway constructed under the 1891 agreement and the 1892 Act was operated by the appellant company and its predecessor in title for the period of 40 years from Sept. 1, 1892. The option to extend its operation for a further period of 20 years was not exercised by the appellant company, and the period of operation accordingly expired on Sept. 1, 1932, but, by agreement with the commission, the actual operation by the appellant company did not cease until Sept. 12, 1932. The appellant company notified the commission before Sept. 1, 1932, of the fact that it did not desire to renew its franchise. The commission took possession of the railway, pursuant to the terms of the 1891 agreement, on Sept. 12, 1932. There was considerable delay in the appointment of arbitrators under cl. 29 of the 1891 agreement, and it was not until May 25, 1935, that the arbitrators appointed thereunder made their award, by a majority fixing the compensation to be paid under the 1891 agreement to the appellant company by the commission at the capital sum of $179,104. This sum was fixed on the basis of the scrap value of the component parts of the railway. The arbitrators did not deal with the question of interest, because it had been decided by this Board in *Toronto City Corpn.* v. *Toronto Ry. Corpn.* (1) that the question of interest did not fall to be dealt with in arbitration proceedings, but was a matter to be decided by the courts.

The appellant company appealed from the award of May 25, 1935, to the Court of Appeal for Ontario. On Dec. 31, 1935, the award, with certain small variations, was affirmed by that court. A further appeal was made to His Majesty in Council, and on Apr. 23, 1937, it was ordered that the appeal should be allowed and that the case should be remitted to the Court of Appeal for Ontario, with a direction to pronounce an order that, among other things, the award of the majority arbitrators should be varied by fixing the compensation to be paid to the appellant company at $1,057,436. This Board held in *International Ry. Co.* v. *Niagara Parks Commission* (2) that there was no justification under the 1891 agreement or the 1892 Act for assessing the compensation at scrap value. Lord Macmillan, who delivered the judgment of this Board, said, at p. 188:

> In the first place—and this is fundamental—it is a railway complete with equipment, machinery and works, which the company was bound to hand over to the parks commissioners on Sept. 1, 1932, and not the components of a railway . . . It could not legally, if it had been possible in fact, have dismantled the railway at the end of the 40 years, and tendered the broken-up material to the parks commissioners in fulfilment of its obligation. That for which it is to be duly compensated is the same thing as that which it was bound to hand over, namely, its railway, with its equipment, machinery, and other works, a going concern, and not a mere collection of materials.

Further, he said, at p. 190:

> As the dissentient arbitrator states: "A long line of cases has approved this [i.e., the principle of reconstruction cost, less depreciation] as a correct method of valuing a public utility where the value of the franchise is excluded from consideration." It is said that the present is not a case of compulsory acquisition, and that this circumstance affects the nature of the compensation payable. The company, it is said, is thankfully relinquishing a *damnosa hereditas*. But again it has to be remembered that the terms of transfer must be read as equally applicable to a transfer of the railway in 1952, when the company's franchise definitely expired, and also to a transfer in the height of prosperity. If the company had been highly

prosperous and had applied for, and obtained, an extension of its franchise to Sept., 1952, it would, on the arrival of that date, have had compulsorily to relinquish, however reluctantly, its profitable undertaking to the parks commissioners, and the same terms of transfer, construed in the same way, would have been applicable.

Further, this Board held, following the decision in *Toronto City Corpn.* v. *Toronto Ry. Corpn.* (1), that the arbitrators had no power to deal A with the question of interest, and that the appellant company must seek enforcement of that claim outside the arbitration.

As already stated, the two questions to be decided in this appeal are (i) whether the appellant company is entitled to interest on the $1,057,436 compensation fixed by this Board from Sept. 12, 1932, until payment B of the sum, and (ii) whether it is competent to the appellant company, if entitled to such interest, to sue for its recovery in an action against the commission. Logically, the second question should be decided first, for, if the contention of the commission which has been accepted by both the lower courts—namely, that the appellant company's only remedy C is by petition of right—is correct, then it matters not in these proceedings whether the answer to the first question is in the affirmative or the negative. It is to be observed that the appellant company has not purported to sue the commission as representing the Crown, nor is the appellant company seeking to reach Crown property. The action is in D form against the commission, a corporation created by statute with express power to sue and be sued. The action is based on a contract made by the commission on its own behalf as well as on behalf and with the approval of the government of the province. The contract in this form was confirmed by the legislature by the 1892 Act, and is declared E to be " valid and binding on the parties thereto."

In their Lordships' view, the commission entered into the 1891 agreement on the express condition that it was to be liable for its fulfilment, and it is, therefore, unnecessary to consider further the more difficult question which would have arisen if the words " on its own behalf " had been F omitted for there is nothing to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as his principal. The words in the 1891 agreement " on its own behalf " are *prima facie* directed to separate liability when read in conjunction with the words which follow—namely, "as well as on behalf of" the Crown. G KELLY, J., gave no weight to these words. Indeed, he said that he did not know what effect the words " on its own behalf " might have on the contract. He continued as folllows :

> It is plain that the defendant commission has no other capacity than that of Crown agent or servant.

H The Acts of incorporation plainly constitute the commission as a corporation with a separate legal entity, and in some, at any rate, of its powers it was obviously recognised that it would have contractual capacity separate from the Crown—e.g., the power to make itself responsible for the moneys secured by debentures issued under the Act, for it is provided that the repayment of the moneys secured by the debentures " may be guaranteed by the Crown." This provision would be meaning-less if the commission was not to be under any liability in the first instance.

The Court of Appeal for Ontario also appears to have ignored these important words, for there is no reference to them in the judgment of McTAGUE, J.A., with which the other members of the Court of Appeal for Ontario agreed. KELLY, J., in his judgment referred to the commission, not only as being the agent or servant of the Crown, but also as " an emanation of the Crown." The latter phrase is also used by McTAGUE, J.A. Their Lordships are unable to appreciate the precise meaning intended to be attributed to this phrase by the courts below. If it is intended to refer to the commission in some capacity other than that of agent or servant, it is impossible to ascertain from the judgments delivered what the legal significance of that capacity may be. The word " emanation " is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is " that which issues or proceeds from some source," and it is commonly used to describe the physical properties of substances (e.g., radium) which give out emanations of recognisable character. The words seem first to have been used by DAY, J., in *Gilbert* v. *Trinity House Corpn.* (3). In his judgment in that case, DAY, J., said, at p. 801 :

> ' The Trinity House, to my mind, is not in the position of a great officer of state. It is nothing more than an amalgamation by authority of state of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of state are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. That is not the case with the Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority.

The judge in the passage quoted seems to use the word as synonymous with servant or agent, and in no other sense. Their Lordships are of opinion that it would avoid obscurity in the future if the words " agent or servant " were used in preference to the inappropriate and undefined word " emanation."

Their Lordships are, for the reasons above expressed, of opinion that the appellant company's action against the commission is competent, and that the commission is properly sued under the 1891 agreement. It follows, therefore, that the question whether interest is recoverable by the appellant company upon the compensation paid under the 1891 agreement falls to be determined. The claim of the appellant company to interest on the compensation money from the date when the commission entered into possession of the railway was in each of the courts below, as it was before this Board, based upon the equitable principle applicable to cases of vendor and purchaser or *quasi*-vendor and purchaser which requires the purchaser, when completing the contract, to pay interest on the amount of the purchase money from the time when he takes possession of the subject-matter of the contract. KELLY, J., refused the claim to interest, because he held that the 1891 agreement was a contract with an owner of land whereby the other party agreed to construct and equip a railway on the owner's land and to deliver possession of the complete railway to the owner on a fixed day, retaining only a right to be compensated. The Court of Appeal for Ontario appear to have adopted this view. Their Lordships do not think that this constitutes an accurate summary of the 1891 agreement. The agreement contemplated that the appellant company would buy lands and rights over lands belonging to owners other than the commissioners, as in fact the appellant company or its predecessor did. These other lands were, it is true, of comparatively small value, but they were the property of the appellant company, and must, in the events which have happened, be conveyed to the commission in the appropriate manner. Further, the whole of the equipment of the railway had to be handed over. Much of such equipment would not pass with the land, although it formed part of the railway as a going concern. It is true that the 1891 agreement is not primarily an agreement for the sale of land, but it can properly be described as one for the transfer of the railway as a going concern. It cannot be properly described as an agreement for the supply of work and materials.

The judge appears to have thought that what he describes as the rule in *Birch* v. *Joy* (4) applies only to cases of sale and purchase of land, but this is plainly not correct. The equitable rule was established many years before the decision in *Birch* v. *Joy* (4), which was in 1852. The true rule is that, if, in cases where courts of equity would grant specific performance, the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase price, he must, in the absence of express agreement to the contrary, pay interest on his purchase money as from the date when he gets possession until the date of payment, because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase money. The rule was applied in 1727 to the sale of a reversionary interest not in land: *Ex p. Manning* (5). In 1807, it was applied to a sale of growing timber. In such a case, the purchase price bears interest, because the purchaser gets the benefit of the growth: Sugden on Vendors and Purchasers, 14th Edn., p. 631. In the same year, the rule was applied to the purchase of an annuity: *Twigg* v. *Fifield* (6). In that case, the sale was under the court, and took effect from the confirmation by the court of the master's report. Lord Eldon held that the purchase price must bear interest from that date, because the purchaser then got the annuity. *Sir Samuel Romilly*, who was counsel for the vendors, appears from the report to have argued that the rule as to interest on purchase price applied only to sales of land, but this argument was not accepted. In 1827, the rule was applied to the sale of a leasehold public house with its stock in trade as a going concern: *Dakin* v. *Cope* (7). There are no doubt many other cases to be found in the books. The most important decision, however, so far as the present case is concerned, is to be found in *Toronto City Corpn.* v. *Toronto Ry.*

Corpn. (1). In that case, Lord Cave said, at p. 193 :

> The general rule under which a purchaser who takes possession is charged with interest on his purchase money from that time until it is paid is well established and has on many occasions been applied to compulsory purchases and their Lordships are not aware of any circumstances which would prevent that principle from applying in the present case.

A One of the matters in dispute in the *Toronto* case (1) was whether the Toronto Railway Corporation was entitled to interest on the compensation payable to it for its railway. The material facts were as follows. In 1891, the Toronto Corporation, having agreed to take over certain B street railways belonging to the Toronto Street Railway Co., invited tenders for the purchase of an exclusive right to operate these railways for a period of 20 years, extensible to 30 years in certain events. One of the conditions provided that, at the termination of the period of operation, the Toronto Corporation might take over all the real and personal property necessary to be used in connection with working the railways at a C value to be determined by arbitration. On Sept. 1, 1891, the Toronto Corporation assigned the railway and property acquired by it from the Toronto Street Railway Co. to the persons who made the successful tender, the condition above referred to being incorporated in the assignment. Shortly after the assignment, the legislature of Ontario passed a D statute (55 Vic. c. 99) whereby the assignment was declared to be valid and binding upon all parties for the full period of 30 years from Sept. 1, 1891. By the same Act, the Toronto Railway Co. was incorporated and empowered to take over from the successful tenderers the agreement of Sept. 1, 1891, and all the property, rights and privileges comprised E therein. The statute contained a provision that, if the Toronto Corporation desired to exercise the right of taking over the property necessary to be used in the working of the railway at the termination of the period of 30 years, it should give notice of its intention so to do, and might at once proceed to arbitrate in the manner specified in the conditions to F which reference has already been made. The Act further provided that, if the award should not be effective by the date when the 30 years' term expired, the Toronto Corporation might take possession of the railway and all the property and effects thereof, real and personal, necessary to be used in connection with the working thereof, on payment into court G either of the amount of the award, if made, or, if not made, upon paying into court or to the company such a sum as a judge of the High Court of Justice of Ontario might order. The Toronto Railway Co. took over the railway and its property and carried on the undertaking during the whole of the period of 30 years. The Toronto Corporation H gave notice of its intention to take over the railway and its property, but, on the expiration of the 30 years' period, the arbitration for fixing the compensation payable to the Toronto Railway Co. had not been concluded. An application was made to the court, when an order was made giving the Toronto Corporation the right to take possession of the railway and its property on payment to the Toronto Railway Co. of

$1,000,000 and on payment into court of $500,000 to abide the event of the arbitration. This order was complied with on Aug. 31, 1921, when the Toronto Corporation took possession of the railway and its property. On Jan. 30, 1923, a majority of the arbitrators awarded that the value A of the Toronto Railway Co.'s railway was $11,188,500. There was considerable litigation in relation to the award, and there was ultimately an appeal to His Majesty in Council. The arbitrators had awarded to the Toronto Railway Co. interest upon the $11,188,500 from the date when the railway was taken over to the date of the award. When the B matter was before the Court of Appeal for Ontario, the court varied the award by striking out, among other things, the allowance of interest on the $11,188,500, on the ground that, though it was equitable that interest should be paid from the time of taking possession, there was no warrant for including it in the award.

C The only difference between the facts of the *Toronto* case (1) and the present is that in the former case the corporation had an option of taking over the railway at the end of the franchise period, while in the present case there is no option, the commission being bound to take over the railway when the franchise period expired. KELLY, J., sought to dis- D tinguish the *Toronto* case (1) from the present solely by reason of the existence of the option. The Court of Appeal for Ontario does not appear to have accepted this view, for MCTAGUE, J.A., said in his judgment that it seems quite clear that the equitable rule as to interest applies in cases involving the sale of lands which include equipment and buildings E all as part of a railway undertaking, and he cites the *Toronto* case (1) in support of this opinion. Their Lordships are of opinion that the present case cannot properly be distinguished from the *Toronto* case (1), and their Lordships' opinion (as stated by LORD CAVE) in regard to the operation of the general rule to which their Lordships in that case referred ought to have F been followed. For these reasons, their Lordships are of opinion that the appeal of the appellant company should be allowed and the judgments of KELLY, J., and the Court of Appeal for Ontario discharged, and that judgment should be entered for the appellant company for a sum equivalent to interest at 5 per cent. on the sum of $1,057,436 from Sept. 12, G 1932, to June 3, 1937, credit being given by the appellant company for the sum of $23,783.86 already paid by the commission in respect of interest, and that the commission should pay to the appellant company the costs of this appeal as well as the costs of the action and the costs of the appeal to the Court of Appeal for Ontario. Their Lordships H will humbly advise His Majesty accordingly.

Appeal allowed with costs.

Solicitors: *Blake & Redden* (for the appellants); *Gard, Lyell & Co.* (for the respondents).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

Re SCAD, LTD.

[Chancery Division (Uthwatt, J.), **May 26, 1941.**]

Companies—Dissolution—Avoidance of dissolution—Application made within two years of dissolution—Companies Act, 1929 (*c.* 23), *s.* 294.

Where an application is made pursuant to the Companies Act, 1929, s. 294, that the dissolution of a company be declared void, the statement in that section that the court may make the order " at any time within two years of the date of the dissolution," means two years between the date of the dissolution and the date of the application.

[**EDITORIAL NOTE.** The Companies Act, 1929, s. 294, provides, *inter alia*, that, where a company has been dissolved, the court may at any time within two years of the date of dissolution make an order declaring the dissolution to have been void. In the present case, the court would have had no jurisdiction to make such an order if, on the proper construction of the section, it was necessary that the order should be made within two years of the date of the dissolution, since a period of more than two years had elapsed between the date of the dissolution and the date of the hearing. It is held, however, that it is the date of the application, and not the date of the order, which is material for this purpose. It is pointed out that to have held otherwise might have led to injustice, since, while the date of the application is within the control of the litigant, he can exercise no control as to the date on which the court makes the order.

As to Avoidance of Dissolution, see HALSBURY, Hailsham Edn., Vol. 5, pp. 755, 756, para. 1282 ; and for Cases, see DIGEST, Vol. 10, p. 1034, Nos. 7174-7177.]

Application by the Inland Revenue that the dissolution of Scad, Ltd., be declared void. Scad, Ltd., was registered under the Companies Act, 1929, on Mar. 17, 1938, as a private company, with the object of carrying on the business of an investment trust company, and it was an investment company within the meaning of the Finance Act, 1936, s. 20. The nominal capital of the company consisted of 100 £1 shares, divided into 95 preference and 5 ordinary shares. The income of the company was derived from a deed of covenant dated Mar. 29, 1938, whereby the respondent Alfred Marland covenanted to pay the company for the remainder of his life or until the winding up of the company, whichever period should be the shorter, an annuity of such a sum as, after deduction of tax at the standard rate, would amount to £125 per week, the aggregate of 52 weekly sums in respect of the period from Apr. 6, 1937, to Mar. 31, 1938, to be paid on or before Mar. 31, 1938. By a special resolution made on Oct. 20, 1938, the company entered into a members' voluntary winding up, the declaration of solvency pursuant to the Companies Act, 1929, s. 230, having been duly made, and Alfred Marland appointed liquidator. On Jan. 3, 1939, the liquidator filed a report pursuant to sect. 236 of the Act, and the company was deemed to be dissolved on Apr. 3, 1939. No returns were ever furnished to the Revenue, and the inspector of taxes applied for a statement by the company. On Jan. 16, 1939, the respondent's accountants informed the inspector by letter that the company's income from Apr. 5, 1938, to the date of the winding up was £3,625 net, and enclosed with the same letter an account of the company's receipts and payments for the

year to Apr. 5, 1938, showing an income of £8,666 (before deduction of tax) for that period. The liquidator received an assessment on the company in respect of the sum of £8,666 for national defence contribution amounting to £433 6*s*. The company through their accountants
A appealed against this assessment on Mar. 22, 1939. The appeal was stood over pending the decision of appeals in similar cases; but, when these appeals were decided in favour of the Crown, it was abandoned. It was necessary, therefore, that the dissolution of the company should be annulled in order to preserve the
B rights of the Crown against it. Accordingly, an application was made to the court on Mar. 31, 1941, pursuant to the Companies Act, 1929, s. 294. The date on which the company was dissolved being Apr. 3, 1939, this application was made within 2 years of that date, but no order had been made thereon at the date of this hearing.

C *J. H. Stamp* for the applicant, the Crown.

M. Gedge for the respondent, the liquidator.

UTHWATT, J.: This case raises a short point—namely, whether, upon the true construction of the Companies Act, 1929, s. 294, the
D jurisdiction of the court to make an order under that section can be exercised only if the order is in fact made within two years of the date of dissolution of the company. That undoubtedly is a plausible way of reading the section, but I think it leads to an incorrect result. It appears to me that, if one reads the section against the background on which the
E court necessarily acts, and has regard to the fact that neither litigant can control the date at which the court makes its order, the period of 2 years referred to is to be decided by taking the period between the date of the dissolution of the company and the date when the application under sect. 294 is made. Therefore, I hold that there is jurisdiction to
F make the order in this case.

Costs to be paid by the applicant.

Solicitors: *Solicitor of Inland Revenue* (for the applicant); *Ashurst, Morris, Crisp & Co.* (for the respondent).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

JELLEY *v.* ILFORD BOROUGH COUNCIL.

[Court of Appeal (MacKinnon and Luxmoore, L.JJ., and Stable, J.), **May 8, 9, 29, 1941.**]

Emergency Legislation—Sandbag-barrier on pavement—Pedestrian injured by colliding with barrier—Power of local authority to erect barrier—Lighting—Contributory negligence—Civil Defence Act, 1939 (c. 31), *s.* 9—*Emergency Powers (Defence) Act,* 1939 (c. 62), *s.* 1—*Defence (General) Regulations,* 1939 (*S.R. & O.,* 1939, *No.* 927)—*Lighting (Restrictions) Order,* 1939 (*S.R. & O.,* 1939, *No.* 1098), *reg.* 51.

Highways—Obstructions—Sandbag-barrier on pavement—Lighting—Common law duty to persons using highway.

The appellant during the blackout walked into a sandbag barrier erected as a screen to an air-raid shelter and sustained injuries. The barrier had been erected by the respondents. The appellant claimed damages, alleging that the sandbags constituted a nuisance on the highway and that the respondents had no statutory or other authority to erect the barrier on the highway. She also alleged that the respondents were negligent in not lighting the obstruction. The respondents pleaded that they had authority to erect the barrier and that the appellant was guilty of contributory negligence :—

Held : (i) the appellant was guilty of contributory negligence.

(ii) (Luxmoore, L.J., *dissenting*) the respondents had authority to erect the barrier.

[**EDITORIAL NOTE.** This case is only of importance on the second point, where the court has expressed a divergence of view as to whether, upon the proper construction of the relevant regulations, the local authority had power to erect this obstruction.

For the Civil Defence Act, 1939, s. 9, see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Statutes Volume, pp. 45-47; and for the Defence (General) Regulations, 1939, reg. 51, see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Emergency Powers, [13], pp. 62, 63.

Cases referred to :

(1) *Lyus* v. *Stepney Borough Council,* [1940] 4 All E.R. 463 ; Digest Supp.

(2) *Great Central Ry. Co.* v. *Hewlett,* [1916] 2 A.C. 511 ; 38 Digest 16, *88* ; 85 L.J.K.B. 1705 ; 115 L.T. 349 ; *revsg.,* 114 L.T. 713.

Appeal by the plaintiff from a judgment of Cassels, J., dated Mar. 3, 1941. The facts are fully set out in the judgment of Luxmoore, L.J.

N. R. Fox-Andrews for the appellant.

Montague L. Berryman for the respondents.

Fox-Andrews : In *Lyus* v. *Stepney Borough Council* (1), the obstruction had been placed close to a lamp. In the present case, there was no lighting of the obstruction. In spite of the statutory regulations due to the war, when a local authority is exercising its powers, it must act with reasonable care towards persons who may be affected by the exercise of those powers. The respondent council had not fulfilled the statutory requirements in erecting this barrier. However laudable its motive may have been, the respondent council was in no better position than a private person putting up an air-raid shelter in the street. When statutory powers are conferred upon a local authority, they must be exercised with care. In the present case, the local authority was guilty of a lack of care as regards lighting. Taking care to keep an obstruction visible is part of the obligation to exercise reasonable care. The decision in *Lyus* v. *Stepney Borough Council* (1) was based upon a condition of affairs fundamentally different from those of the present case. It is only in a limited sense that it is true to say that the lighting regulations do not permit the placing of a light upon this barrier. [Counsel referred to *Great Central Ry. Co.* v. *Hewlett* (2).]

Berryman : The appellant had just left premises which were well-lighted, and the violence of her impact with the barrier could be due only to her own speed in walking. The council was entitled to put this obstruction upon the highway. The Emergency Powers (Defence) Act, 1939, s. 1 (4), gives wide powers to the Lord Privy Seal to make regulations, and the Defence (General) Regulations, 1939, reg. 51, is made under that section. The reasons given on behalf of the appellant as to why the barrier could not be erected under reg. 51 are untenable. [Counsel referred to *Lyus* v. *Stepney Borough Council* (1).]

MACKINNON, L.J. : During the black-out the plaintiff walked, with some violence into a pile of sandbags and hurt her eye. The sandbags had been erected by the defendants as a screen to a shelter, and to prevent the blast of falling bombs from injuring people taking refuge in that shelter. The plaintiff sued the defendants for damages, alleging that the sandbags constituted a nuisance on the highway and that the defendants had no statutory or other authority for their deposit on the street. She also alleged negligence on the part of the defendants in not lighting the obstruction. The defendants pleaded that they were authorised to erect the sandbags, and they also pleaded that there was contributory negligence on the part of the plaintiff. CASSELS, J., upheld both these defences and gave judgment for the defendants. The plaintiff appeals.

On the question whether the defendants were authorised to erect the sandbags, we were referred to a series of very obscure Acts and statutory rules and orders. Personally, I do not think that it is necessary to express any opinion on this part of the case. It is manifest to me that the judge was right in finding contributory negligence, and that is sufficient to justify his judgment and to result in the dismissal of this appeal. I agree with CASSELS and STABLE, JJ., and, if it were necessary, I should hold that the erection was lawful and authorised. However, I entirely agree with their proposed order that this appeal be dismissed with costs, since the plaintiff's contributory negligence is amply sufficient to bring about that result.

LUXMOORE, L.J. : On the evening of Dec. 8, 1939, at a time when the lighting regulations prescribed by the Lighting (Restrictions) Order, 1939, were in force, the plaintiff came into collision with a barrier of sandbags erected during that day by the servants of the Ilford Borough Council on the footway outside No. 13, High View Parade, Ilford, and suffered facial injuries. On May 31, 1940, she instituted proceedings against the council claiming damages in respect of these injuries. The amount of damages was subsequently agreed at the total sum of £59.

The basis of the plaintiff's claim was that the erection by the defendants of the barrier constituted a nuisance, and that they were guilty of negligence by reason of their failure to light the barrier or whiten it or otherwise indicate its position in the footway, or take precautions to prevent pedestrians from colliding with it. The defendants by their defence admitted that the barrier was erected by their servants and alleged that this was done under statutory authority in order to protect a public air-raid shelter provided by them in pursuance of their statutory obligations. They further denied that the barrier constituted a nuisance, and alleged that the plaintiff was guilty of contributory negligence in colliding with the barrier, because she failed to keep a proper look-out or to take any precautions for her own safety. The action was tried by CASSELS, J., on Mar. 8, 1941. The judge dismissed the action and ordered the plaintiff to pay the costs of the defendants. He held that the barrier was erected in pursuance of statutory authority, and, therefore, did not constitute a nuisance, and that the defendants were not negligent. He also expressed the view that, if it had been necessary to decide whether or not the plaintiff was guilty of contributory negligence, he would have decided that she was. The plaintiff has appealed from the order made by the judge, and asks this court to set it aside and to order that judgment may be entered for her for £59 and costs, or, alternatively, for a new trial.

The grounds of the appeal are (i) that the barrier was erected without any statutory authority, and (ii) that, if there was statutory authority for its erection, the defendants did not comply with the requirements of the relevant statutes and orders, and, therefore, were not in a position to rely on that statutory authority. It was also argued that in either event the barrier constituted a nuisance in a public highway, and that the defendants were consequently liable, because there was no contributory negligence on the part of the plaintiff.

The evidence established that the barrier occupied a space 7ft. 3ins. long and 4ft. 2ins. wide on the forecourt in front of No. 13, High View Parade. This forecourt is 12ft. wide, and between it and the metalled highroad known as Woodford Avenue there is a verge 24ft. 6ins. wide. Before the barrier was erected, No. 13, High View Parade had been requisitioned under the Defence (General) Regulations, 1939, reg. 51, for the purposes of being used as an air-raid shelter, and the defendants had constructed such a shelter on the ground floor. The frontage of No. 13 to the forecourt appears from the agreed plan to be 20ft. in length. On the south side there is an entrance 3ft. 9ins. wide. The defendants had placed along the remainder of the frontage—namely, 16ft. 3ins. of its length, and flush with it—sandbags to a depth of 4ft. 6ins., but in the middle of this part of the frontage there were no sandbags, because it was necessary to leave a narrow entrance to the air-raid shelter. The barrier, to which reference has already been made, was erected by the defendants on Dec. 8, 1939, immediately opposite the entrance to the air-raid shelter in order to protect the shelter and the persons using it from blast resulting from the explosion of any bombs which might fall in the immediate neighbourhood. There was a space of 2ft. between the outside of the line of sandbags placed along the frontage of No. 13 and the side of the barrier nearer to No. 13, while there was a space of 1ft. 4ins. between the side of the barrier farther from No. 13 and the 12ft. verge lying between the forecourt and the metalled highroad. The height of the barrier appears from the agreed photographs to be about 7ft. or 8ft.

On the evening of Dec. 8, 1939, the plaintiff, who was familiar with the neighbourhood, had an appointment with a hairdresser who carried on her business at 12a, High View Avenue, the shop adjoining No. 13 on its southern side. She reached the hairdresser's shop at about 5.30 p.m., when, according to her evidence, it was not very dark. She stated that she did not notice the barrier, and did not in fact pass it. She remained at the hairdresser's shop until 7.30 p.m. When she left, it was very dark, and she came out to the forecourt from a lighted room. She wished to go past the barrier, and, according to her evidence, came almost immediately into violent collision with the corner of it and suffered the injury already mentioned. The forecourt is admittedly part of the public highway, and it was suggested, though there is no evidence on this point, that it was under the control, not of the defendants, but of the Essex County Council as the highway authority.

No evidence was tendered at the trial to inform the court of the steps taken for the provision of air-raid shelters in Ilford beyond putting in a circular referred to as A.R.P. Department Circular 198/1939, and the documents enclosed therewith, which were, as appears from the circular, sent by the Lord Privy Seal to the town clerk of Ilford. The circular is headed: "Requisitioning of premises for civil defence purposes." One of the documents sent with this circular was a copy of a letter whereby the Lord Privy Seal delegated his requisitioning powers under reg. 51 to certain clerks of local authorities, including the town clerk of Ilford, and it was argued on behalf of the defendants that the barrier in question was erected under this regulation which is to be found in the Defence (General) Regulations, 1939, made by order in council dated Aug. 15, 1939, under the Emergency Powers (Defence) Act, 1939, s. 1. The judge accepted this argument, and held that the barrier was erected in accordance with the provisions of the Defence (General) Regulations, 1939, reg. 51, which, so far as is material, provides as follows:

> Taking possession of land. (1) A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety . . . may take possession of any land, and may give such directions as appear to the

> competent authority to be necessary or expedient in connection with the taking of possession of that land. (2) While any land is in the possession of a competent authority by virtue of this regulation . . . the land may, notwithstanding any restriction imposed on the use thereof (whether by any Act or other instrument or otherwise), be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient in the interests of the public safety . . . and the competent authority, so far as appears to it to be necessary or expedient in connection with the taking of possession . . . (*a*) may do, or authorise persons using the land as aforesaid to do, in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest, and (*b*) may by order provide for prohibiting or restricting the exercise of rights of way over the land, and of other rights relating thereto which are enjoyed by any person, whether by virtue of an interest in land or otherwise. (3) The owner or occupier of any land shall, if requested by or on behalf of a competent authority so to do, furnish to such authority or person as may be specified in the request such information in his possession relating to the land (being information which may reasonably be demanded of him in connection with the execution of this regulation) as may be so specified. . . . (5) A competent authority may, to such extent and subject to such restrictions as it thinks proper, delegate all or any of its functions under paras. (1) to (3) of this regulation to any specified persons or class of persons.

With all respect to the judge, I do not think that this regulation authorises the acquisition of a part of a public highway, or the erection on part of a public highway of an air-raid shelter or works connected therewith, for none of its provisions seems to me to be directed to, or appropriate to, such a purpose. It was suggested before us as well as before Cassels, J., that power to erect the barrier in question might be found in the Civil Defence Act, 1939, s. 9 (1), which provides as follows:

> Power of local authorities to construct air-raid shelters in streets. (1) Subject to the provisions of this section, the local authority may provide a public air-raid shelter on any highway and may for that purpose construct works in or on the highway or land adjoining the highway and affix appliances to any building or wall adjoining the highway.

By sect. 90, "air-raid shelter" is defined as meaning:

> . . . protection, otherwise than by war-like means or by any article of apparel, from hostile attack from the air . . .

By the same section, "an air-raid shelter" is defined as meaning:

> . . . any premises, structure or excavation used or intended to be used to provide air-raid shelter.

By reason of these definitions, it appears to me that a barrier such as the one in question might properly fall within the description of a public air-raid shelter on a highway. The provisions of sect. 9 referred to in subsect. (1) are, so far as they are material, set out in subsects. (2) and (3) as follows:

> (2) In the case of a highway for the maintenance of which a highway authority other than the local authority is responsible, the local authority shall not exercise their powers under this section without the consent of the highway authority. (3) At least 14 days before exercising any powers under this section the local authority shall (*a*) serve upon the occupiers of any land or building adjoining the site of the proposed shelter a notice stating their intention to exercise the powers and specifying the general nature of the shelter; (*b*) affix a similar notice in a prominent position upon or as near as possible to the site of the proposed shelter; and (*c*) cause a similar notice to be published in a newspaper circulating in the area of the authority.

No evidence was directed to the establishment of the fact that the requirements of subsects. (2) and (3) had been complied with, and, in the absence of such evidence, it is impossible to hold that the defendants erected the barrier under the statutory authority afforded by this section, for there is no evidence that there was any compliance with the requirements of the subsections referred to. It was not suggested that any other statutory authority for the erection of the barrier existed, and, consequently, I am unable to agree with the finding of the judge that the defendants discharged the onus of proving that the barrier was erected under statutory authority, and, for the purposes of this case, I think that I am bound to treat the barrier as an unauthorised obstruction of the highway, and, therefore, a nuisance. It may well be that, if the history with regard to the provision of air-raid shelters in Ilford is investigated, evidence that the barrier in question was properly erected under statutory authority might be forthcoming, but no evidence with regard to such history was tendered to the court.

Having regard to the conclusion at which I have arrived, it becomes necessary to consider the question whether the plaintiff was guilty of contributory negligence. In my judgment, the opinion expressed by CASSELS, J., on this question is correct. According to the plaintiff's own evidence, she came into violent collision with the barrier, and she must plainly have been walking much faster than a reasonably careful person ought to have walked in the circumstances then prevailing, having regard to the fact that she had only just left a well-lit room. The case appears to be one where the fact that the plaintiff collided with the stationary object, and the nature of the collision, speak for themselves. I think that on this ground the appeal fails, and must be dismissed with costs.

STABLE, J.: In this case, the appellant, who was the plaintiff in the court below, brought an action for damages against the Ilford Borough Council in respect of the injuries she sustained on the night of Dec. 8, 1939, when she came into collision with a barrier of sandbags erected in the highway by the council as a protection to an air-raid shelter constructed in an adjacent building against blast. The plaintiff alleged that the sandbag-barrier was a public nuisance, inasmuch as it had been erected in the highway without any statutory or other authority, and, further, that, even if the respondents had authority to erect it, they were guilty of negligence at common law because of the manner in which it was erected. The respondents, while putting these matters in issue, relied in addition on the defence of contributory negligence. The case was tried by CASSELS, J., who held that the respondents had authority to erect the barrier, that they had not been guilty of negligence at common law because of the manner of its erection, and that the action accordingly failed. He further stated that, if it had been necessary for him to decide the point, the respondents had satisfied him that the evidence established the plea of contributory negligence.

It would, perhaps, be sufficient to say that I agree with the result at which CASSELS, J., arrived and with the grounds on which he based his decision, but, as the question whether or not this obstruction to the highway, in the circumstances in which it was erected, constituted a public nuisance is of some general importance, I shall make a few observations on it. The importance of this question is emphasised by the fact that, if the barrier had been erected by the council without statutory or other authority, it would have constituted a public nuisance, with the result that any member of the public would have had the right to abate it, so far as it was necessary to enable him to exercise his right of way on the highway. Moreover, the construction of a nuisance in a highway may amount to an indictable misdemeanour.

The only statutory or other authority on which the respondents relied before the judge and in this court as justifying the erection of the barrier was the Defence (General) Regulations, 1939, reg. 51, which, so far as is directly material, provides as follows:

> (1) A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety . . . may take possession of any land . . . (2) While any land is in the possession of a competent authority by virtue of this regulation . . . the land may, notwithstanding any restriction imposed on the use thereof (whether by any Act or other instrument or otherwise), be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community . . .

The regulation provides in para. (2) (*b*) that the competent authority

> . . . may by order provide for prohibiting or restricting the exercise of rights of way over the land, and of other rights relating thereto which are enjoyed by any person, whether by virtue of an interest in land or otherwise.

The regulation also contains certain provisions applicable to land in private ownership but inapposite if applied to land dedicated to the use of the public, such as a highway. In the present case, the appropriate Minister, the Lord Privy Seal, delegated the exercise of certain of the powers conferred by the regulation, including those set out in para. (1) and part of para. (2), to the clerk of the respondent council, but expressly excluded from the delegation the power to make an order prohibiting or restricting the exercise of rights of way. There is no doubt that in the present case the delegation of powers was lawfully made, and the only question raised on this aspect of the case is whether or not the powers conferred by the regulation and delegated to the clerk were wide enough to justify what was done.

In my judgment, notwithstanding that parts of the regulation contemplate the exercise of powers over lands in private ownership, and are inapplicable to land dedicated to the use of the public, such as a highway, this must necessarily be the case if the regulation is intended to embrace land however owned or enjoyed, and affords no sufficient ground for cutting down the generality of the language of para. (1) and the first part of para. (2). The regulation gives the competent authority power to take possession of any land, and "any land" means, in my judgment, any land however owned or enjoyed, and is wide enough to include land dedicated as a highway. Once in possession, the user of the land is restricted only by what the competent authority thinks expedient in the interests of the public safety, or the other matters set out in the regulation. In normal times, and under normal conditions, the conception of taking possession of a public highway may seem somewhat remote, but there is no physical impossibility in taking possession of such land, and, in times and circumstances which are far from normal, I can see no inherent improbability in the legislature making it lawful if it should be in the public interest to do so. The fact that the power by order to provide for prohibiting or restricting the exercise of rights of way over the land was not delegated to the clerk of the respondent council is immaterial, in my judgment. That power contemplates the making of an order, for example, prohibiting the public from passing over a particular highway at all, or restricting their rights to pass over a particular highway during certain hours or in a particular manner. In the present case, no such order was made, or could have been made, but, in my judgment, the omission to delegate the power does not prevent the competent authority from lawfully taking possession of part of a highway and there erecting an obstruction such as the sandbag barrier now in question. Under the delegated powers provided, the authority thought it expedient in the interests of the public safety to take possession of this part of the highway. They were at liberty to use the site for such purpose and in such manner as the interests of the public safety required, with the result that this sandbag barrier was, in my judgment, lawfully erected, and did not constitute a public nuisance.

As regards the appellant's second contention—namely, that, even if the sandbag barrier was erected in the exercise of a statutory power, the respondent council were guilty of negligence in the way in which they erected it—in my judgment, this is a question of fact, and, if, indeed, there were any evidence in the present case which could have supported a finding of negligence at common law (on which I do not express an opinion), I am satisfied that the decision of the judge on this question of fact was right. As the appellant has failed, in my judgment, to establish a claim against the respondent council, the defence of contributory negligence does not arise, since contributory negligence is a matter of defence, and, if no case is established by the plaintiff, there can be nothing in relation to which a defence can operate. It is sufficient to say that on this point I entirely agree with the finding of the judge and the other members of this court that the evidence established negligence on the part of the plaintiff herself which directly caused, or substantially contributed to, the accident by which her injuries were sustained, and which, if a case of nuisance or negligence had been established against the respondents, would have afforded a defence to the action.

Appeal dismissed with costs.

Solicitors: *Keene, Marsland, Bryden, Besant, Batham & Cork* (for the appellant); *William Hurd & Son* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

STEVENSON *v.* AUBROOK AND OTHERS.

[Manchester Winter Assizes (Hallett, J.), **April 2, 3, 1941.**]

Criminal Law—Arrest without warrant—Under statutory provisions—Indecent exposure—Power to arrest offender—Offence not committed—Reasonable cause for suspicion—Vagrancy Act, 1824 (*c.* 83), *ss.* 4, 6.

The plaintiff brought an action for unlawful arrest and false imprisonment against two police constables and an inspector. A woman was understood to have complained to a woman friend that a man riding a bicycle had indecently exposed himself to her, whereupon the two women had requested a third person to telephone the police station and transmit a complaint, together with a description of the man concerned. On receipt of the complaint, two constables—two of the defendants—drove off immediately in a police car and succeeded in arresting the defendant. It was later found that there had not in fact been any exposure. The constable returned to the police station, and, 1½ hours after the arrest, the plaintiff was released on his own bail. On the following day, leave to withdraw the charge was obtained from the magistrates. The plaintiff maintained that the constables had no power, either at common law or by statute, to arrest him, and that, consequently, both the initial arrest and subsequent detention were unlawful :—

Held : the Vagrancy Act, 1824, s. 6, makes it lawful " for any person whatsoever to apprehend any person who shall be found offending against this Act." The defendants did honestly and on reasonable grounds believe that the plaintiff had committed the offence complained of, but this did not justify an arrest without warrant in respect of an offence referred to in sect. 4 of the Act, when the offence had not, in fact, been committed.

Ledwith v. *Roberts* (2) *followed.*

Semble : it is not necessary that the person making the arrest should actually see the offence committed. The doctrine of instant or itinerant pursuit applies so as to justify an arrest made in circumstances similar to those in the present case.

[**EDITORIAL NOTE.** This case deals with the conflict between two fundamental principles—namely, (i) the liberty of the subject, and (ii) the protection of the public. The general rule is that, where a statute confers a power of arrest and does not expressly give the right to arrest on reasonable and probable cause for suspicion, no such right of arrest can be inferred unless there is an immediate need of arrest so as to prevent injury to the public. When the offence complained of is that of indecent exposure, the necessity of protecting the public would appear to be the overriding consideration, and Hallett, J., would have so held but for the decision of the Court of Appeal in *Ledwith* v. *Roberts* (2). In that case, which dealt with another offence under the Vagrancy Act, 1824, s. 4, it was held that sect. 6 conferred no right of arrest on honest suspicion in respect of such an offence. It was also considered by Greene, L.J., that the provisions of sect. 4 were not severable so as to give a right of arrest on honest suspicion in some cases and not in others. The questions involved in the present case are of unusual interest and importance, and it is to be hoped that they will be considered by a higher tribunal.

As to Power of Arrest Without Warrant, see HALSBURY, Hailsham Edn., Vol. 9, pp. 89-95, para. 119 ; and for Cases, see DIGEST, Vol. 14, pp. 183-186, Nos. 1617-1660.]

Cases referred to :

(1) *Horley* v. *Rogers* (1860), 2 E. & E. 674 ; 14 Digest 185, *1647* ; 29 L.J.M.C. 140 ; 2 L.T. 171.

(2) *Ledwith* v. *Roberts*, [1937] 1 K.B. 232 ; [1936] 3 All E.R. 570 ; Digest Supp. ; 106 L.J.K.B. 20 ; 155 L.T. 602.

(3) *Hanway* v. *Boultbee* (1830), 4 C. & P. 350; 14 Digest 185, *1638*.
(4) *Downing* v. *Capel* (1867), L.R. 2 C.P. 461; 14 Digest 185, *1640*; 36 L.J.M.C. 97; 16 L.T. 323.
(5) *Griffith* v. *Taylor* (1876), 2 C.P.D. 194; 14 Digest 184, *1641*; 46 L.J.Q.B. 152; 36 L.T. 5.
(6) *Roberts* v. *Orchard* (1863), 2 H. & C. 769.
(7) *Leete* v. *Hart* (1868), L.R. 3 C.P. 322.
(8) *Treate's Case* (1875), 39 J.P. 235.
(9) *Trebeck* v. *Croudace*, [1918] 1 K.B. 158; 14 Digest 183, *1622*; 87 L.J.K.B. 272; 118 L.T. 141.
(10) *Isaacs* v. *Keech*, [1925] 2 K.B. 354; Digest Supp.; 94 L.J.K.B. 676; 133 L.T. 347.
(11) *Gorman* v. *Barnard*, [1940] 3 All E.R. 453; Digest Supp.

ACTION for damages for unlawful arrest and false imprisonment.

At about noon on Aug. 1, 1940, a Mrs. Bushby was sitting on a deck-chair in the garden of her house at Stockport, when she saw a man ride past on a bicycle. She was able to give a fairly complete description of that man. The man rode up and down in front of her several times, making movements of an indecent character, but there was no indecent exposure. She was extremely upset by this, and, seeing her neighbour's child playing in the garden, she asked him to fetch his mother, Mrs. Burchall. When Mrs. Burchall arrived, Mrs. Bushby told her what had occurred. The latter went to the corner of the road, saw the man riding away, and noticed that he kept turning round and that he was fumbling with the front of his trousers. Mrs. Bushby and Mrs. Burchall then went to an A.R.P. post in charge of a Mrs. Hallam, and inquired there for the police. Mrs. Hallam said that there was none there until the evening, but rang up the police and transmitted a complaint to them, as well as a description obtained from Mrs. Bushby of the man against whom the complaint had been made.

That complaint was received by Hughes, a police officer who was on duty at the detective office at Stockport, and there happened to be standing by him the defendant Constable Aubrook, who accordingly became immediately aware of the complaint and of all its details.

When Mrs. Bushby called in Mrs. Burchall, the latter asked whether the man had exposed himself to Mrs. Bushby, and Mrs. Bushby said that he had, but after the matter had been investigated, Mrs. Bushby consistently said that he did not. Thus it came about that, when the complaint was transmitted by Mrs. Hallam to Hughes and Aubrook, the complaint was one of indecent exposure. Having received that complaint, Aubrook and the defendant Constable Hodgson at once went out in a police car to find the man against whom the complaint was being made.

The police car proceeded with great promptness, and the two constables soon overtook the plaintiff, who answered in every particular to the description of the man of whom Mrs. Bushby had complained. The car had a police sign on it, and one of the two policemen was in uniform, while the other was in plain clothes. Hodgson leant out of the window of the car and spoke to the plaintiff, asking him to stop. The plaintiff increased his speed and rode off recklessly. After the car had been turned round, the police gave chase, and, about a quarter of a mile off, they succeeded in stopping the plaintiff. The plaintiff then said that he was a constable in the Manchester Police. He did not, however, produce any document of any sort or kind to establish his identity. He was told by them that a complaint had been recently received and that he answered the description of the man of whom the complaint was made. He replied that he knew nothing about it, and the police decided that it was their duty to arrest him. They put him into the back of the car and took him to the police station. On the way, one of them said that it was a serious thing to claim to be a police constable if one was not, whereupon the plaintiff said : "I had better not say I am a police officer. Put me down as John Smith, bricklayer, no fixed abode." Later on, he said : " Can't you cuff it this time ? It means a lot to me. My wife is expecting." That was the fact. The two constables took the plaintiff to the police station and brought him before the third defendant, Inspector Rawlinson. When Inspector Rawlinson heard what the officers had to say, which was all said in the presence of the plaintiff, he was minded to put the plaintiff up for an identification parade, but, when he said so, Hodgson said that the plaintiff had admitted the offence on his way down to the station. Thereupon Inspector Rawlinson said to the prisoner in effect : " You hear what has been said ? It is said that you have pleaded guilty." The plaintiff replied : " Yes. I understand. I have been a fool, I do not know what made me do it." Thereupon Inspector Rawlinson decided that it was unnecessary to have an identification parade. The plaintiff was then detained until bail was available.

As soon as this had taken place, Aubrook was sent down to see Mrs. Bushby and investigate. When he saw her, she said that she had not actually seen the man's person. When she was asked why the offence had been reported as indecent exposure, she said that she could not say. Mrs. Burchall and Mrs. Hallam told the officers that they understood Mrs. Bushby's complaint to be that the man had indecently exposed himself to her. The officer at once reported that, having regard to what Mrs. Bushby had said, the charge could not be substantiated. He went straight back to the police station and informed Inspector Rawlinson and another detective inspector what had happened, and the plaintiff was at once released on his own bail.

The following day, the plaintiff appeared at the police court. He was not put in the dock, and the leave of the magistrates to withdraw the charge was obtained.

Upon these facts the plaintiff brought his action for false imprisonment. The defendants contended that they had reasonable grounds for supposing that the offence had been committed and had gone in instant pursuit.

Kenneth Burke for the plaintiff.

Neville Laski, K.C., and *A. E. Jalland* for the defendants.

HALLETT, J.: The question which arises is whether the detention A was justified. The defendants have had, in substance, two points to meet. In the first place, it has been said against them, and said rightly, that there is no common law power to arrest for misdemeanour, and that, therefore, this arrest and detention must be justified, if at all, by reference to some statutory power of arrest conferred upon the defendants. The B only place where such a statutory power can be found for this purpose is in the Vagrancy Act, 1824, s. 6, whereby it is made lawful

> . . . for any person whatsoever to apprehend any person who shall be found offending against this Act . . .

Then there is a penalty against any constable who shall refuse or C wilfully neglect to take such an offender into custody.

The first point taken against the defendants is that the police officers did not find the plaintiff offending against the Vagrancy Act, 1824, inasmuch as they did not see anything done by the plaintiff which could constitute an offence. That point on behalf of the plaintiff could D no doubt be supported by *Horley* v. *Rogers* (1), which was cited by SCOTT, L.J., in *Ledwith* v. *Roberts* (2), at p. 267, as in itself sufficient to defeat the appeal in *Ledwith* v. *Roberts* (2). The first difficulty I feel about the law in this case is that, while *Horley* v. *Rogers* (1) does appear to proceed upon the basis that the constable arresting must actually E see the offence perpetrated before his eyes, there are other cases which seem to me to lay down equally clearly that, if a person is found to be committing an offence by a police constable who goes in instant pursuit —and, I think I should add, in itinerant pursuit—of the offender, then, if that police constable arrests the person in question, he is justified in F making that arrest. That seems to be put very plainly in *Hanway* v. *Boultbee* (3). There the person who saw the offence committed was Mrs. B., whose dog had been hurt. She sent a boy to fetch a constable, and it was the constable who made the arrest. TINDALL, C.J., in summing up to the jury, clearly took the view that such an arrest could be G justified, and that, therefore, the claim in respect of false imprisonment might be regarded as having failed. That case is 30 years earlier than *Horley* v. *Rogers* (1), but there are a number of other cases—namely, *Downing* v. *Capel* (4), *Griffiths* v. *Taylor* (5), *Roberts* v. *Orchard* (6), *Leete* v. *Hart* (7) and *Treate's Case* (8). I think it will be found that in all H those cases this doctrine of instant pursuit is recognised as subsisting.

Therefore, there seem to be points which might usefully be cleared up by some higher court. However, it is not necessary for me to come to any conclusion upon it in this case for the following reason. In *Hanway* v. *Boultbee* (3), TINDAL, C.J., said that the jury would have to consider, first, whether the plaintiff had committed a wilful injury to the dog, and, secondly, whether he was found committing that offence and was immediately apprehended. Assuming that the defendants can get over the difficulty that the offence, if any, was not committed under their eyes—and I think that they probably could by virtue of the doctrine of instant pursuit, the fact being, as I have stated, that this was as instant a pursuit as there could very well be—they would also have to show that the offence had, in fact, been committed. The offence here charged was that of indecent exposure, and there is no evidence to show that that offence had been committed. Indeed, it is only right to say that the evidence of Mrs. Bushby, so far as it goes, is directly to the contrary. Therefore, the defendants have not shown, and have not attempted to show, that the offence in question was in fact committed under the eyes of someone else.

That being so, if this arrest is to be justified, the defendants must show that the power of arrest conferred by sect. 6 authorises constables to arrest, if they suspect, and have reasonable grounds for suspecting, that a person has been found committing an offence against the Vagrancy Act, 1824. With regard to that aspect of the matter, there is again a great deal of authority. I do not propose to refer to all the cases. The first case is *Trebeck* v. *Croudace* (9), but I think it right to draw attention to the fact that it is not the earliest case on the topic. References to earlier cases are in the report, and there is the later case of *Isaacs* v. *Keech* (10).

In *Trebeck* v. *Croudace* (9), the ground given by Swinfen Eady, L.J., for the decision of the court is this, at p. 164:

> The statute confers a power of immediate arrest, and obviously intends that it should be acted upon at once, and without waiting to obtain a warrant. In the case of the offence of being drunk in a highway and in possession of a loaded firearm usually a police officer would be unable to say whether the firearm was loaded or not without taking it into his possession and examining it. Is it to be said that if he sees a drunken man in a street in possession of a gun and brandishing it about he must abstain from intervening unless he is sure that the gun is loaded, or otherwise risk an action being brought against him? Is he to wait until the drunken man shows that the gun was loaded by discharging it? And then perhaps it may no longer be a loaded firearm.

Then he goes on to say, at p. 165:

> The nature of the offence mentioned in sect. 12 shows, in my opinion, that the legislature intended the authority to apprehend to apply where the circumstances are such as to enable an honest belief upon reasonable grounds to exist that the offence is being committed by the person being apprehended.

The judgments of Bankes and Warrington, L.JJ., are to the same effect. In fact, Warrington, L.J., says at p. 170:

> It would in my opinion, reduce the section to an absurdity if a constable under such circumstances were to be liable to an action for false imprisonment . . .

The section there in question was the Licensing Act, 1872, s. 12.

This sort of question has been considered more recently in *Gorman* v. *Barnard* (11), where Clauson, L.J., said, at p. 464:

> I am prepared to accept *Trebeck* v. *Croudace* (9) as authority for the following proposition which may well be (and, indeed, must, I think, in this court be taken to be) the law—namely, that the natural construction of a section conferring a power of arrest upon an executive officer in case of the commission of an offence is that it confers a power of arrest in the case of an honest belief on reasonable

> grounds that the offence has been committed, if the character of the offence is such that, in the interests of public safety, or on account of threatened danger to life, limb or property, prompt action is called for. If that be a correct view of the canon of construction to be applied, it seems clear that reliance cannot be placed on any principle to be derived from the decision in *Trebeck* v. *Croudace* (9), where, as in the present case, the power is given merely for the purpose of facilitating the recovery from the alleged offender of certain penalties. A

That was a case where the offence was "knowingly harbouring uncustomed goods, consisting of a box of cigars, with intent to avoid the payment of duty thereon." If all I had to do in this case was to decide whether the offence of which the plaintiff was suspected fell within the
B category described in *Trebeck* v. *Croudace* (9) or within the category to which, according to CLAUSON, L.J., *Gorman* v. *Barnard* (11) belongs, I think that my task would be fairly easy.

I am quite satisfied here, upon the evidence, that the defendants did honestly and on reasonable grounds believe that the plaintiff had
C committed the offence of wilfully exposing his person with intent to insult any female. However, the difficulty with which I am faced is that, as it seems to me, in *Ledwith* v. *Roberts* (2) the majority of the Court of Appeal have decided the question for me, and I am bound, sitting here as a judge of first instance, loyally to follow any guidance
D which has been afforded to me by that court.

So far as the judgment of GREER, L.J., in *Ledwith* v. *Roberts* (2) is concerned, there is no difficulty at all. SCOTT, L.J., at p. 262, has provided a list of offences included in the Vagrancy Act, 1824, s. 4. No. 13 is as follows:

> E . . . being a suspected person or reputed thief and frequenting any place of public resort with intent to commit felony.

The decision of GREER, L.J., as I understand it, was based upon the fact that it had not been proved, and had not, I think, even been alleged, that the respondents there were suspected persons or reputed thieves
F within the meaning of the relevant part of sect. 4. That, of course, has nothing to do with this case which I am now considering.

I am not going to refer to the other facts in *Ledwith* v. *Roberts* (2), because with those also I am not concerned, nor am I going to refer to the historical review of the vagrancy legislation which SCOTT, L.J.,
G provided, or to the desirability of its reform. However, when I come to the judgment of GREENE, L.J., I find this passage at p. 256:

> There does not appear to me to be any such reason of emergency in the case of some, at any rate, of the offences mentioned in the Vagrancy Act, 1824, s. 4; and I do not think it would be permissible to construe sect. 6 as justifying an arrest on honest suspicion in the case of some of those offences and not in others—it must be all or none.

H Then, after reading a passage from the judgment of BANKES, L.J., in *Trebeck* v. *Croudace* (9), GREENE, L.J., said, at p. 257:

> I cannot myself read this decision as extending to cases other than those where the nature of the suspected offence requires prompt action.

I want to say quite plainly, with all possible respect to the court above that, if I were asked whether the nature of the suspected offence here required prompt action, I should answer that question without an instant's hesitation in the affirmative. Here the suspected offence is a man riding round on a bicycle indecently exposing his person, and the matter certainly did, in my opinion, require prompt attention. I repeat what I said during the argument—namely, that, looking at this offence as a layman, I should not only say that the police were justified in taking the action they took in view of the information which they had received, but I should go further and say that, in the view of the ordinary man in the street, the police would have been lamentably failing in their duty if they had done anything else. Greene, L.J., has expressed the view, as it seems to me, that, in the case of offences under sect. 4, the right to arrest on reasonable suspicion does not arise under sect. 6. I think that he would have gone further, because he doubts whether *Trebeck* v. *Croudace* (9) was rightly decided. He does not suggest, however, that it is not binding, and Scott, L.J., I observe, said, at p. 270, that the law of this country is as laid down in *Trebeck* v. *Croudace* (9) until it is reversed by the House of Lords. Therefore, I am justified, I think, in treating *Trebeck* v. *Croudace* (9) as the law. I think that the decision in *Ledwith* v. *Roberts* (2) supports that view, and also that in *Gorman* v. *Barnard* (11), but it seems to me that I am precluded by the judgments of Greene and Scott, L.JJ., which expressly refrain from holding that the doctrine in *Trebeck* v. *Croudace* (9) is applicable where the offence is one under the Vagrancy Act, 1824, s. 4, and where the only power to arrest is that derived from sect. 6 of that Act.

For my own part, with all respect to those judges whose views are at least such that I do not feel justified in disregarding them, I feel much more inclined to agree with MacKinnon, L.J., in *Gorman* v. *Barnard* (11). I am not talking about the actual decision in that case. I appreciate how Clauson, L.J., distinguishes *Trebeck* v. *Croudace* (9), and I say nothing as to what I should have thought if the matter had fallen for decision by me, but, with regard to what MacKinnon, L.J., says generally on the question of *Trebeck* v. *Croudace* (9) and *Isaacs* v. *Keech* (10), I think that, if I were unfettered by authority, I should have taken the same view as he did. It seems to me, however, that I am precluded by authority from deciding this case in favour of the defendants.

Reverting to what I said at the beginning of this judgment, it seems to me that, if the law is as I have just said I think it is having regard to the decision in *Ledwith* v. *Roberts* (2), the police are very greatly fettered in performing their duty of protecting the public, and I think it must come as a shock to a layman to learn that, if the police receive, and believe, such a complaint as was made by Mrs. Bushby in this case, they can take no action other than applying for a warrant or a summons against a man whose identity they are in most cases probably quite unable to establish. It seems to follow from *Ledwith* v. *Roberts* (2) that a man can go round upsetting women by conduct of this kind until he is at some time so indiscreet as to commit the offence in front of a constable, or is recognised by someone who is able to give information which will lead to subsequent proceedings against him.

Judgment for the plaintiff against each of the first two defendants for 40*s. and against the third defendant for* 20*s. damages. No order as to costs.*

Solicitors: *Booth & Booth* (for the plaintiff): *Boote, Edgar & Co.*, agents for *Town Clerk*, Stockport (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

LEICESTERSHIRE COUNTY COUNCIL *v.* MICHAEL FARADAY & PARTNERS, LTD.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.JJ.), **May 22, 1941.**]

Rates—Valuation—Valuers employed by rating authority—Inclusive remuneration—Claim by rating authority to all documents prepared by valuers in course of work—Rating and Valuation Act, 1925 (*c.* 90), *s.* 38.

The appellant council employed the respondent company to value and report upon properties in the council's area in accordance with the provisions of the Rating and Valuation Act, 1925, s. 38. The agreement between the parties was for 5 years, and the respondent company received a fixed annual salary which was inclusive of all expenses necessary in connection with the work, including the cost of note-books, plans, etc. At the end of the employment, the appellant council sought to recover from the respondent company all books, maps and documents prepared by them as valuers to the council, on the ground that such documents were the council's property:—

HELD: the relationship of the parties was not that of principal and agent, but was that of client and professional man. The documents claimed having been prepared by the respondents as professional men for their own assistance in carrying out the duties, they were entitled to retain them.

[**EDITORIAL NOTE.** Where an agent in the course of his employment brings into existence certain documents, those documents are the principal's documents and the principal is entitled to possession of them. Where, however, a professional man is retained on behalf of a client, apart from a special term in the retainer, documents coming into existence in the course of the carrying out of his duties by that professional man are not the client's documents, unless they are specially prepared for the client.

AS TO EMPLOYMENT OF VALUERS BY COUNTY VALUATION COMMITTEE, see HALSBURY, Hailsham Edn., Vol. 27, pp. 473, 474, para. 904; and FOR CASE, see DIGEST, Vol. 38, p. 583, No. 1170.]

Cases referred to:

(1) *Beresford (Lady)* v. *Driver* (1851), 14 Beav. 387; 7 Digest 437, *418*; 20 L.J Ch. 476; 17 L.T.O.S. 307; *subsequent proceedings* (1852), 16 Beav. 134.

(2) *Gibbon* v. *Pease*, [1905] 1 K.B. 810; 7 Digest 436, *417*; 74 L.J.K.B. 502; 92 L.T. 433.

(3) *London School Board* v. *Northcroft* (1889), 2 Hudson's B.C., 4th Edn., p. 147; 7 Digest 449, *478*. A

APPEAL by the plaintiff council from a judgment of MACNAGHTEN, J., at the Leicester Assizes, dated Mar. 3, 1941. The facts are fully set out in the judgment of MACKINNON, L.J.

N. L. C. Macaskie, K.C., and *Gerald A. Gardiner* for the appellant council. B

A. S. Comyns Carr, K.C., and *H. F. Bidder* for the respondent company.

Macaskie, K.C.: The agreement which the appellant council had with the respondent company was not only to advise but also to value and survey. C If a valuer is employed under the Rating and Valuation Act, 1925, s. 38, he is not employed merely to put a figure in the valuation list. The work which enables him to arrive at the final figure needs the preparing of a mass of documents. Any document which is brought into existence by a valuer in his work in preparing the reports for the council D must belong to the council in order that the council may be able to carry out its statutory duties when that particular valuer ceases to be employed. The Act of 1925 imposes continuing duties upon a rating authority. Under the provisions of sect. 38, those duties can be delegated to a valuer. If, however, the valuer, on ceasing to be so employed, insists upon keeping E the material upon which he has based his valuations, he is keeping material which can be of no value to him but which may be of great value to the rating authority. In the present case, the agreement provides that the salary shall be inclusive of all out-of-pocket expenses which are necessary to carry out the work. The appellant council has not paid for F the final result only, but it has paid for all the information collected by the valuers. *London School Board* v. *Northcroft* (3) is distinguishable from the present case. In *Gibbon* v. *Pease* (2), the documents were ordered to be given up, and the present case is analogous to that one in that the documents were brought into existence to enable the G work to be done. In *Beresford (Lady)* v. *Driver* (1), the memoranda could have been of no use to the agent. In the present case, the books and documents can be of no use to the respondent company. [Counsel referred to HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 31, p. 102, para. 148.]

H *Comyns Carr, K.C.:* The agreement does not provide that the documents should be given up. It is not pleaded that such a term should be implied. Sect. 38 of the 1925 Act, differentiates rating surveyors from other kinds of professional people. It is not the case that the council delegated duties to an agent. The only way in which the council can get a compulsory entrance into premises is by employing a professional man.

The council was employing somebody to do that which could not otherwise be done. *Beresford* (*Lady*) v. *Driver* (1) bears no analogy to the present case. [He was stopped by the court.]

Gardiner, in reply.

MacKinnon, L.J. : This is an action brought by the Leicestershire County Council against the defendants for the alleged wrongful detention of certain documents and other things. The Rating and Valuation Act, 1925, s. 38 (1), provides as follows :

> Any rating authority, assessment committee, or county valuation committee, may, if they think fit, employ a competent person to give advice or assistance in connection with the valuation of any hereditaments in their area, and any person so employed shall have power, at all reasonable times and after giving due notice, and on production, if so required, of authorisation in writing in that behalf from the rating authority or committee authenticated by the signature of their clerk, to enter on, survey and value any hereditament in the area of the authority or committee. . . .

Pursuant to the power so given them, the Leicestershire County Council, on behalf of the various rating authorities, assessment committees and county valuation committees in their county, did employ a competent person—namely, the defendant company—to give advice or assistance in connection with the valuation of hereditaments for the purposes of rating.

The council employed the company under a written agreement, dated Jan. 1, 1935, which is expressed in somewhat vague terms, and, in some passages, in terms which rather suggest an invitation to litigation. In substance, however, the material parts of it are that the valuers, the defendants, are to render assistance to the county valuation committee in valuing properties, and they are to render that assistance by making reports. I think that it is most material that in subcl. (*f*) of the agreement it is provided as follows :

> From time to time and so often as the same shall occur, upon receipt of instructions from the county valuation committee, the valuers shall inspect and value any hereditaments within the county area (including special properties) and shall report upon such valuation to the county valuation committee, rating authority or assessment committee as the case may require.

Then it is provided by subcl. (*g*) that, as regards special new valuation lists, the valuers are to inspect properties :

> . . . and shall report upon such valuations to the county valuation committee, rating authority or assessment committee as the case may require as soon as possible after receiving instructions.

The agreement under which the valuers are to render these services is to last for 5 years. It was provided that they should be paid remuneration for those services during the 5 years at an annual salary of £2,500, payable in quarterly instalments. With regard to that salary, it is provided that the salary

> . . . shall be inclusive of all out-of-pocket expenses, including cost of transport, office accommodation, staff, notebooks, plans, etc., that may be necessary to carry out the work.

The valuers, the defendants, carried out their duties pursuant to that agreement during the 5 years, and, so far as any of us know, carried them out without criticism or comment by the plaintiffs. That is to say, they entered upon various premises and made reports, as the case required, to the valuation committees.

At the end of 5 years, a certain man who had represented the defendants in Leicester in connection with this particular contract was minded to A
leave them and, as I gather, entered into a new individual agreement with the plaintiffs, I suppose as an expert valuer of this sort. Then, no doubt, as he had been carrying out all the work, a good many memoranda and other documents had accumulated in the course of his work during the 5 years for the defendants, and I daresay it B
would have been convenient and useful to him if he could have treated them as his own property and taken them away. The defendants, possibly because they had some grievance against that man for leaving them in that way, took the point, when asked to hand over all these documents, that they were not documents to which the plaintiffs were C
entitled. Thereupon, after some correspondence, the plaintiffs brought this action, claiming that the defendants were in possession of certain documents which were the property of the plaintiff council, and which were being wrongly detained. Therefore, they ask for a declaration that the council are the owners and entitled to possession of: D

> All documents, books, maps, plans and other materials or particulars prepared by or which came into the possession of the defendant company in the course or for the purpose of their performance of their duties as the council's valuers.

One difficulty which the judge below felt, and which I share to the full, is that it is very difficult to understand what precise sort of documents were being referred to. One must assume that during the 5 years all the E
documents which, pursuant to the terms of the contract, it was the duty of the defendants to prepare and forward to the plaintiffs (such as are referred to in the passages which I have read) were duly prepared and furnished, because there is no trace of any complaint of any failure to do that. Those other documents, as they are vaguely referred to, are appar- F
ently the memoranda, notes upon scraps of paper and various other things which may have come into existence, jotted down perhaps in a note-book by the particular man who went to carry out the duty of inspecting a hereditament and making up his mind about its valuation. It is suggested that all pieces of paper of that description used by the G
defendants in the course of their visits and in the course of making their estimates of values were in fact the property of the plaintiffs, and became so directly they came into existence. There is nothing in the contract itself which supports any such proposition.

The only passage in the contract which is relied upon is the reference to H
plans in the passage I have read, which provides that the salary of £2,500 per annum

> . . . shall be inclusive of all out-of-pocket expenses including cost of transport, office accommodation, staff, note-books, plans, etc., that may be necessary to carry out the work.

It is fairly obvious to me that the reference to note-books and plans is a quite unnecessary addition to the proposition that this salary is an inclusive salary, and that the defendants are not to be entitled to any claim for out-of-pocket expenses in addition to it, but are to pay their own out-of-pocket expenses in the nature of office accommodation, wages, stationery A and the other things for which they have to pay in order to carry out their work. If there is nothing in the contract upon which the plaintiffs can rely to establish that they are right in saying that these pieces of paper are their property, by what rule of law otherwise can the plaintiffs assert that these pieces of paper are their property? I know of none.

B Some reference has been made to, and reliance placed upon, two cases which were cited by counsel for the appellants, *Beresford* (*Lady*) v. *Driver* (1) and *Gibbon* v. *Pease* (2). I think that those cases were radically different, in that they were cases concerned with the relative rights and duties of principal and agent. If an agent brings into existence certain C documents while in the employment of his principal, they are the principal's documents, and the principal can claim that the agent should hand them over. This, however, is emphatically not a case of principal and agent. It is a case of a client and a professional man to whom the client resorts for advice. I see no reason at all (and I D think that it would be entirely wrong) to extend to such a relationship what may be the legal result of the quite different relationship of principal and agent. These pieces of paper, as it seems to me, cannot be shown to be in any sense the property of the plaintiffs, any more, as I suggested to counsel for the plaintiffs during the argument, than his E solicitor client or his lay client could assert that his notes of the careful and strenuous argument which he addressed to us here could be claimed to be delivered up by him when the case is over, either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, but they are not documents F brought into existence by an agent on behalf of his principal, and, therefore, documents which it can be said are the property of the principal.

I have, perhaps, said too much in regard to this case, because it would have been sufficient, I think, if I had said that I entirely agreed with the G very careful judgment of Macnaghten, J., and with the reasons which he gave for rejecting the plaintiffs' claim. I think that he was quite right, and that, as a result, this appeal fails, and should be dismissed with costs.

Goddard, L.J.: I agree. I do not think that it is necessary to add H anything, except that *London School Board* v. *Northcroft* (3) was not a case of principal and agent. That was a case exactly like this, in which A. L. Smith, J., emphatically thought that detinue would not lie for documents of exactly the same class as these. They were memoranda which were in the possession of quantity surveyors who had been employed by the London School Board. When they had completed their work, the London School Board demanded the memoranda which the quantity surveyors had prepared for their own use in measuring up the buildings. Upon this A. L. Smith, J., said:

> Now I should like to know how it can be said that what I call the private memoranda which were made by Messrs. Northcroft for the purpose of framing that which ultimately became the property of the plaintiffs, namely the bill of quantities, ever became the property of the plaintiffs. The paper belonged to Messrs. Northcroft, the ink belonged to Messrs. Northcroft, and the brains that put the calculations on paper belonged to Messrs. Northcroft; and I want to know how that document which came into existence ever became the property of the plaintiffs. A

It seems to me that that is exactly the case here. If, indeed, authority was needed for the proposition, which seems to me a pretty plain one, *London School Board* v. *Northcroft* (3) is a direct authority of an eminent judge that, in circumstances such as these, there is no claim against professional people for the documents which they prepare to enable them to carry out the work which they are employed to do. B

C

du Parcq, L.J.: I agree, and I have nothing to add.

Appeal dismissed with costs.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Lucas E. Rumsey*, Leicester (for the appellants); *Richardson, Sadler & Co.* (for the respondents). D

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

T. P. GILBERT & SON, LTD. *v.* BIRKIN.
WILSON *v.* BIRKIN.

[KING'S BENCH DIVISION (Humphreys, Tucker and Cassels, JJ.), **April 8, 9, 1941.**]

Emergency Legislation—Maximum price order—Validity—Emergency Powers (Defence) Act, 1939 (*c.* 62), *s.* 1 (1).

Emergency Legislation—Sale of feeding stuffs—Sale for seed purposes—Home-grown beans—Feeding Stuffs (Maximum Prices) Order, 1940 (*S.R. & O.*, 1940, *No.* 11), *art.* 2.

The appellants were charged with selling home-grown beans at a price in excess of that prescribed by the Feeding Stuffs (Maximum Prices) Order, 1940, art. 2. The sale was a sale between one dealer and another of home-grown beans for seed purposes, and was so stated in the invoice. It was contended that, being a sale for seed purposes, it could not be within a feeding stuffs order, and, further, that the order was void in that it was *ultra vires* the statute under which it was made:—

HELD: (i) upon the proper construction of the order, the offence had been committed.

(ii) a power to make such orders as may be necessary for maintaining supplies and services essential to the life of the community includes the power to make orders fixing maximum prices.

[**EDITORIAL NOTE.** The order fixed the maximum prices for the articles mentioned in the schedule. The appropriate entry in the schedule was home-grown beans. It was argued that this applied only to home-grown beans sold for the purpose of being used as food for animals and so forth, and not to those sold for seed purposes. The court has not taken this view, and it is clear that it does create a difficulty, because the seller has no control over the purposes for which the beans may be used. The decision as to the validity of the order is useful, as it settles a question which may be raised on any occasion when a prosecution is brought under such an order. The general power appears to have been couched in particularly wide terms, and it seems indisputable that the maintenance of supplies is best secured by the fixing of prices, especially the prices of primary commodities.

AS TO MAXIMUM PRICES ON SALE OF FOOD, see HALSBURY, Hailsham Edn., Vol. 15, p. 136, para. 214; and FOR CASES, see DIGEST, Vol. 25, pp. 135-139, Nos. 535-558.]

APPEALS by way of case stated, the decision in the first case governing the decision in the second. In the first appeal, the case was stated by the Lincoln justices, who had convicted the appellants in respect of certain offences against the Feeding Stuffs (Maximum Prices) Order, 1940. The facts are fully set out in the judgment of HUMPHREYS, J.

P. E. Sandlands, K.C., and *Geoffrey Howard* (for *G. R. Swanwick* on war service) for the appellants in both cases.

Valentine Holmes and *L. F. Sturge* for the respondent.

HUMPHREYS, J.: The offence stated in para. 1 of the case stated is that the appellants:

> . . . did unlawfully commit an offence against the Defence (General) Regulations, 1939, reg. 55, in that they contravened an order made thereunder—namely, the Feeding Stuffs (Maximum Prices) Order, 1940, art. 2—by selling home-grown beans to one Kenneth Wilson otherwise than in accordance with the provisions of the said order, to wit, at a price in excess of the price prescribed by the said order, and without other lawful authority.

The first point with which we have to deal is one of general importance, though, in my judgment (and I am only expressing my own opinion), it is one of no difficulty whatever. It is a point which appears in the statement of the case and which was taken in the court below. It is said that the order under which these appellants were convicted was itself null and void, in that it was an order purporting to be made under the Defence (General) Regulations, 1939, reg. 55, and that that regulation, in so far as it purported to give power to make such an order, was itself null and void, in that it was *ultra vires* the statute under which power was given to make such a regulation. It is necessary to look shortly at the relevant terms of the statute. The statute in question is the Emergency Powers (Defence) Act, 1939, which is the statute giving power to make defence regulations. By sect. 1 (1), power is given to His Majesty to make by order in council :

> . . . such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

It is those latter words which were thought to be—and, in my opinion, were rightly thought to be—the justification for the making of reg. 55, which is a regulation made by His Majesty in Council under those latter words. The regulation is as follows :

> A competent authority, so far as appears to that authority to be necessary in the interests of the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide (*a*) . . . in particular, for controlling the prices at which such articles may be sold . . .

The question which we have to decide is whether a regulation authorising orders for controlling maximum prices at which articles may be sold is *ultra vires* the statute which allows such a regulation to be made if it is a regulation "for maintaining supplies and services essential to the life of the community." To put it in a sentence, what that argument amounts to is that there is no power, and that there never has been any power, under the Emergency Powers (Defence) Act, 1939, to make any order controlling maximum prices at which articles may be sold.

I think that one need only mention one article which everyone will agree is a supply essential to the life of the community, and one not far removed from that with which we are dealing in this case—namely, milk. Can it seriously be doubted that, if milk could be sold at any price which the vendor could induce a rich person to pay him, there would very soon be such a shortage of milk that poor people and the children of the poor, who most require it, would find a terrible shortage of that essential commodity ? The matter, in my view, is put very well in the case stated in the paragraph setting out the respondent's argument, which was accepted by the justices who stated this case and before whom this matter was argued. It is put in this way :

> Reg. 55 was not *ultra vires*, as the fixing of maximum prices for feeding stuffs enables farmers to maintain supplies of milk at reasonable cost.

When one realises that the fixing of maximum prices for feeding stuffs means to some extent feeding stuffs for milk cattle, I can only say that, in my opinion, it is plain that that is a form of regulation which is calculated to maintain supplies and services essential to the life of the community. Therefore, upon this first point, I have nothing more to say about the matter. My view is that reg. 55 is *intra vires*, and it does not appear to be contended that the order in question, which purports to be made under reg. 55, is not within the terms of that regulation.

I now come to the second point which was argued. The conviction in this case, as has already been said, was for selling home-grown beans otherwise than in accordance with the provisions of the Feeding Stuffs (Maximum Prices) Order, 1940. It is convenient at once to look at the terms of that order, because it is not disputed, and, indeed, it is stated in the case, that the appellants did sell home-grown beans, and that they did sell them at a price higher than the maximum price at which home-grown beans may be sold according to the terms of that order. Art. 2 of the order provides as follows :

> Subject as hereinafter provided no specified feeding stuffs shall be sold at a price exceeding the appropriate price . . .

The order, as counsel for the appellants has quite truly insisted, is the Feeding Stuffs (Maximum Prices) Order, 1940, and relates to nothing else except feeding stuffs, and it is the specified feeding stuffs which are not to be sold at a price exceeding the appropriate price—namely, in fact the maximum price—mentioned in a schedule to this order. The appropriate price is defined in art. 1 as meaning, "in relation to the sale of any of the feeding stuffs set out and described in the first column of each of" various parts of the first schedule to the order, "the price applicable thereto in accordance with the" price mentioned in the second column of the various parts of that schedule. Looking at the schedule, the part with which we are concerned is Part D, which is a part of the first schedule, which is divided into parts referred to by letters of the alphabet. The whole schedule is headed in this way : "Maximum prices of feeding stuffs." Then follow Parts A, B, C and D, and Part D includes, amongst other things, "Beans, home-grown, other than cluster or tic beans" (it is not suggested that these were cluster or tic beans), and the price is £10 per ton.

So far, it would seem that these defendants had contravened the very plain terms of that order, but their counsel has argued to this court that some limitation must be placed upon that expression "Beans, home-grown," or upon that expression "home-grown beans," because it never can have been intended that, in all circumstances, and for all purposes, a maximum price should be fixed for the sale of home-grown beans by something which has no special reference to home-grown beans at all, but is a feeding stuffs order, and which contains references to a very great number of various articles, of which beans are only one.

The argument of counsel for the appellants may, I think, be put in this way. Here one has an order relating solely to feeding stuffs. That means, of course, articles used for feeding to animals as distinct from human beings, and also means articles such as beans which are not intended and sold for use for seed purposes, because that is nothing to do with feeding stuffs. He says that there is to be found in this case no finding of fact at all that the beans in question were feeding stuffs, or that they were sold as feeding stuffs, or that they were intended for use as feeding stuffs. On the contrary—he put it at one point in his argument, I think, as high as this—there is a finding of fact that the beans in question were not sold as feeding stuffs, but were sold for seed purposes. That is putting it a little too high, because, when one looks at the statement to which he is referring in the case, this is all that is said. It appears in para. 4 (4), (5), as follows:

> The transactions were between dealer and dealer.

That is to say, the sale in question was a sale by the appellants as dealers to somebody else who was also a dealer. In subpara. (5), it is said that it was stated on each invoice that the beans were sold by the appellants to the purchaser for seed purposes. It is found also that, upon the invoice under which the appellants bought from a grower, the same words occurred, so that the beans were bought by them for seed purposes, according to the invoice, and were sold by them for seed purposes.

For my own part, I do not think that the matter is important, in the view which I take of this case, but it is right as a matter of accuracy to observe that the mere fact that the invoice contained those words is by no means a finding that the beans were sold for any particular purpose at all, and, indeed, upon the evidence in this case, it would have been wrong to say that the justices were enabled to find, or that they did find, that this particular transaction was a transaction of the sale of beans for seed purposes, or for any other purpose, because, the transaction being between one dealer and another, the beans were sold for resale by the purchaser, and nothing more. When once the appellants had parted with the beans, they had no control over the use which was made of them by the purchaser, and they did not pretend that they had. The same reasoning applies, although it is quite immaterial, to the purchase by them. I think that all that subpara. (5) can be used for is to substantiate the statement that it was the intention and the desire and the understanding of the appellants that these persons to whom they sold these beans would sell them to somebody else, who would probably use them for seed purposes, and for nothing more.

However, there is also a finding in the case—and there is no dispute about it—that this was a perfectly *bona fide* transaction, and an honest transaction, and not a transaction entered into for the purpose of defeating the terms of the order, and, therefore, it may be taken, I think, that the sale in this case was probably for all practical purposes, if the articles were intended for any purpose, such that the beans were intended for seed purposes.

Counsel for the appellants says : " How can it be said that, when beans are sold for seed purposes, that constitutes a sale of feeding stuffs ? It does not." To my mind, that argument is a very attractive one, for the reason that, as counsel for the appellants has pointed out in that argument, it would seem that what is hit by this order is a transaction which must have been totally foreign to the mind of the person who drafted the order, as nothing to do with the feeding stuffs which are the subject of the order, and it is, therefore, having an effect which at least was never contemplated by those who were responsible for the order.

Counsel for the appellants goes a little further, and argues as follows. The schedule purports to be a schedule of feeding stuffs. If it is to be said that home-grown beans must be feeding stuffs, home-grown beans include beans which are sold by greengrocers to persons for human consumption. That would have the effect of preventing any sales of beans taking place between a greengrocer and his ordinary customers at a price of more than £10 per ton, which has been worked out as being little more than 1*d*. per lb., which, of course, would be a perfectly ridiculous price. Even those of us who are as ignorant as I am (and I am probably the most ignorant person here) upon the subject of prices know that one cannot expect to buy first-class beans for consumption in one's own household at 1*d*. per lb.

Whether or not that is the effect of this, or might have been the effect of this, I do not stop to inquire, and I certainly do not decide, but I do appreciate the point which is made by counsel for the appellants as to the possible effect of an order so drawn. It was with great interest that I learnt this morning that the Minister of Food has since realised that the order, in the terms in which it was drafted, was, so far as home-grown beans were concerned, much too wide, and he has in fact revoked the whole of the order by the Home Grown Beans (Control and Maximum Prices) Order, 1940, dated Aug. 28, 1940. The sale in this case, it was said, was some time in Mar., 1940. By para. 12 of that order, the Feeding Stuffs (Maximum Prices) Order, 1940, which is the one under which this transaction is impugned, and in respect of which this case is stated :

> . . . is revoked in so far as the same relates to home-grown beans.

Further, it is observed that, by para. 11 of that amending order, it is provided as follows :

> The maximum prices prescribed by this order shall not apply to beans bought by or sold to a grower or approved buyer for use as seed.

It is quite true that that would not have made any difference to the particular transaction which took place in this case, because there was no question of the purchaser being an approved buyer. I do not even know that there was such a thing as an approved buyer in existence at that time, but it is an indication that the lumping together in one expression as " home-grown beans " of beans which were intended for use as seed and beans which were intended for food for cattle as if they were all one and the same thing and all feeding stuffs was an error, and it has in fact been amended.

I now come to the question whether those considerations can—and, if so, to what extent they can—affect my decision upon the conviction which has taken place in this case. I have come to the conclusion that the A argument of counsel for the respondent is conclusive in the matter, and that the justices were right in the view which they took when they held, as they did, that the argument on the part of the respondent that beans sold for seed were not exempted from the provisions of the order was a sound one. They said that they came to that conclusion, and that, therefore, B they convicted. It seems to me that it is impossible to get over this plain statement of what appears in the order in question :

> . . . no specified feeding stuffs shall be sold at a price exceeding the appropriate price . . .

The specified feeding stuffs are those which appear in a schedule, and one C of those specified feeding stuffs is home-grown beans. How then can it be said that home-grown beans are not a specified feeding stuff ?

I think there is something to be said for one limb of the argument of counsel for the appellants. He did argue at one time that no article to be found in this schedule could be the subject of a prosecution unless it were an article which was sold for the purpose of being used as a feeding D stuff, but I think that that is putting it too high. I cannot find any indication in the order that the purpose for which the beans are intended to be used is to be the criterion of whether or not they come within the schedule, but I do go so far as to say that I think that, if it were found that beans or any other article could not be used as feeding stuffs, the E mere fact that they appeared in the schedule would not induce me to say that an offence was committed by the sale of feeding stuffs. However, beans, as everybody knows, are things which may be feeding stuffs. They may be used as food for cattle. They may be used, as the amending order has recognised, for a totally different purpose—namely, for seed. F

I find in the amending order to which I have referred a phrase which I think might well be used by me now as indicating my understanding of the words in this schedule. The expression is this :

> " Beans " includes all beans which are commonly grown for feeding to livestock. G

Inasmuch as home-grown beans are articles which are commonly grown for feeding to livestock, I think that it is impossible to say that the sale of home-grown beans, whatever may have been the intention as between the vendor and the purchaser as to the subsequent use of those beans, does not come within the language of art. 2, which prohibits their sale at a H price exceeding the appropriate price.

We have also been referred by counsel for the appellants to the Fertilisers and Feeding Stuffs Act, 1926, and to some case or cases decided under that Act. For my own part, I do not derive any assistance from the language of that Act or from the decisions which took place under it, and I base my judgment upon what I think are the plain words of the somewhat unfortunately expressed order, which is the Feeding Stuffs (Maximum Prices) Order, 1940.

TUCKER, J.: I agree with what HUMPHREYS, J., has said with regard to the first point raised in this case stated—namely, the contention that the Defence (General) Regulations, 1939, reg. 55, is *ultra vires* the Emergency Powers (Defence) Act, 1939. That raises a question of considerable importance, and that is the only reason why I add any observations of my own on this part of the case. Sect. 1 of the Act of 1939 gives power, *inter alia*, to His Majesty by order in council to make regulations for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community. Purporting to act under the authority of that section, His Majesty in Council made this reg. 55, which provides as follows:

> A competent authority, so far as appears to that authority to be necessary in the interests of the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide (*a*) for regulating or prohibiting the production, treatment, keeping, storage, movement, transport, distribution disposal, acquisition, use or consumption of articles of any description, and, in particular, for controlling the prices at which such articles may be sold . . .

It is now contended that, whatever may be said with regard to the other words in that subsection, the words "for controlling the prices at which such articles may be sold" go beyond anything which is authorised by the Emergency Powers (Defence) Act, 1939, s. 1. It is said that the mere fixing of maximum prices does not tend to maintain supplies, and we were invited to take judicial notice of the fact that the fixing of maximum prices is said to have had the opposite effect in certain cases. I think that the case with which we are here dealing is a very good example of the way in which the fixing of maximum prices should tend, or may tend, to maintain essential supplies. I think that the fixing of maximum prices of cattle food should result, and that anybody so fixing the prices would contemplate that it would result, in a larger number of farmers getting an even and constant supply of food for their cattle. If that is the result, that will further result in a greater output of milk, and a more even output of milk, throughout the country, and that again will result in the maintenance of an essential supply. For those reasons, whatever may be said with regard to the fixing of the price of milk itself, I think that this case is a very good example of how the fixing of maximum prices may tend to the maintenance of supplies which depend on the supply of other articles. I say no more with regard to the first point.

With regard to the second point, which was argued first by counsel for the appellants, speaking for myself, if I had felt any doubt as to whether this case sufficiently raised the point that the sale of beans in this case was a sale of beans for seed purposes, I think that I should have desired it to be sent back to the justices for them to state the case more clearly on that point, but, as I understood, counsel for the respondent would be prepared to deal with this case on the basis that it did contain a finding that the sale of beans in this case was a sale for seed purposes. I have listened to counsel on each side on that basis, and I accordingly treat the case, speaking for myself, as one where the justices did intend to find that in this case the beans were bought and sold for seed purposes. Whether or not, in a sale of this kind, the vendor can control the ultimate use which the purchaser may make of the article raises questions of difficulty, but none the less I deal with it on the basis that this was a sale of home-grown beans for seed purposes.

The argument of counsel for the appellants was to the effect that home-grown beans, which appear in the schedule to this order, must be sold for the purpose of feeding cattle in order to come within this order. He says that it is an order dealing only with feeding stuffs, and, therefore, that art. 2 of the order is not broken unless somebody sells home-grown beans as a feeding stuff, and that, if he sell home-grown beans for any other purpose, there is no infringement of this order. He invites us to look at the order as a whole and draw that inference from it. On the other side, counsel for the respondent argued that all that the court had to do was to look at the schedule, and that, looking at the schedule and finding the words "home-grown beans," that was sufficient, and that, as I understood his argument, anything which came under the description of home-grown beans automatically became a specified feeding stuff within the meaning of this order. In fact, he said that art. 2 might be read as if it had merely provided, "Subject as hereinafter provided, no article set out in the schedule hereto shall be sold at a price exceeding the appropriate price," and that all that one had to do was to look at the schedule, and any article there found set out could not be sold for any purpose at all at a price exceeding the appropriate price.

I have come to the conclusion that neither of those arguments is sound. I go some way with the argument of counsel for the appellants. I agree that there must be some limitation put upon the words "feeding stuffs." This is a feeding stuffs order, and I do not agree that the mere fact that some article is included in the schedule means that it can never, in any circumstances, be sold at a price exceeding that which appears in the schedule. If we take the case of home-grown beans, I was much troubled at one time by what I thought might be the consequences of the argument of counsel for the respondent. If he is right, it seems to me that it must follow that a sale of home-grown beans in a greengrocer's shop to an ordinary customer would be a breach of art. 2. On further consideration, however, I do not think that that is the necessary consequence at all, for this reason. Although I agree that the words "specified feeding stuffs" or "feeding stuffs" have some limitation—namely, that they relate only to those articles in the schedule which are commonly used as feeding stuffs, or are capable of use as feeding stuffs—I can find nothing in the order which limits the order to such articles when they are being sold for that specific purpose, and, therefore, I have come to the conclusion that the mere fact that home-grown beans, being admittedly articles which are capable of being used for cattle food, and which commonly are used for cattle food, have in this case been sold for a different purpose A —namely, for use as seed—does not take them outside the order at all. I think that the position might well have been otherwise if there had been evidence that they were beans of a different kind altogether from those which are customarily used for seed or for feeding cattle—namely, beans customarily used for human consumption. I think that in that case B there might have been a great deal to be said for the argument that they did not come under this order at all. In fact, speaking for myself, I do not think that they would. To some extent, one is fortified in that view, perhaps, by the amending order which was subsequently made. Although I agree that we must not interpret this maximum prices order in the light C of any subsequent order, I am none the less relieved to find that home-grown beans have, as a matter of fact, been altogether taken out of this order, so that the consequences of any judgment of this court can have no bearing at all at the present time on the question of beans which are used for human consumption. For these reasons, I have come to the conclusion D that the justices came to a right conclusion in these cases.

CASSELS, J.: I agree with what HUMPHREYS and TUCKER, JJ., have said with regard to the justices having arrived at a right conclusion, and I agree that the result of that decision upon our part is that the appeals E must be dismissed. I would desire to add only a very few words.

So far as regards the point that this order is *ultra vires*, I agree that it would seem that a legal and proper way of maintaining supplies essential to the life of the community is to make an order that prices shall be controlled, and, if there is to be an order to control prices, it cannot be F done much better than by prescribing the maximum price.

So far as the main point which has been argued is concerned, I have looked with no little interest at the Feeding Stuffs (Maximum Prices) Order, 1940, dated Jan. 6, 1940. It is the wording of that order and the omission on the part of the draftsman to realise what we have realised G throughout this case—namely, that home-grown beans can be sold for seed as well as for feeding stuffs—which is the cause of all this trouble. It is curious to find, when one looks through that order as passed, that, whilst the words "feeding stuffs" occur over and over again, there is no reference, except one in the paragraph commencing with the word H "concentrate," to animals, poultry, livestock or anything of the kind. If a prosecution is brought under this order against any greengrocer who may have charged more than 1¼*d.* per lb. for home-grown beans, and comes before the Divisional Court, then will be the time to consider whether this order does in fact include a grocer or a greengrocer who has sold at a price higher than the maximum mentioned in the order. I do observe, however, that, when the amending order came to be made, whoever drafted that was particular to define home-grown beans to the extent of saying that they include "all beans which are commonly grown for feeding to livestock." It would have saved much trouble if it had been used in the original order. I also find that the order further says that it " does not include runner, climbing French, dwarf French, kidney, seville, broad or soya beans," most of which are beans well-known as being used for human consumption. Not content with that, however, whoever drafted the amending order goes a little further, and tells us exactly what " livestock " means. He says that it means :

> . . . horses, mules, asses, cattle, sheep, pigs, goats, chickens, fowls, ducks, turkeys, guinea fowls, geese and carrier pigeons.

In the original order, only once, as I have said, was the word " animals " mentioned. This case concerns seed. It concerns, not animal consumption, not feeding stuffs for livestock, not even beans for human consumption, but seed, a matter which unfortunately does not seem to have occurred to the draftsman of the Feeding Stuffs (Maximum Prices) Order, 1940.

Unfortunately, the transaction in which the appellants were concerned comes within the order, and, again, I agree with what Humphreys and Tucker, JJ., said—namely, that the purpose for which the article is sold cannot take persons outside the operation of the order. There is an amending order which has dealt with transactions relating to seed. The original order was dated Jan. 6, 1940, but those who are interested in the sale and purchase of seed had to wait until Aug. 28, 1940, before something was done to take them out of the operation of the Feeding Stuffs (Maximum Prices) Order, 1940. The position is that these appellants have been fined. The case has been stated. I agree that the justices, in the circumstances, and in the position of the orders as they existed at the time when these offences were committed, came to right conclusions in law, and that, therefore, these appeals must be dismissed.

Appeals dismissed. No order as to costs.

Solicitors : *Cunliffe & Airy*, agents for *Ernest H. Godson & Co.*, Sleaford (for the appellants in the first case) ; *W. J. & E. H. Tremellen*, agents for *Emsley & Son*, Leeds (for the appellant in the second case) ; *Treasury Solicitor* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

DIRECTOR OF PUBLIC PROSECUTIONS *v.* A. E. LAMB AND B. LAMB.
DIRECTOR OF PUBLIC PROSECUTIONS *v.* A. LAMB.
DIRECTOR OF PUBLIC PROSECUTIONS *v.* R. LAMB.

[KING'S BENCH DIVISION (Humphreys, Tucker and Cassels, JJ.), **April 7, 8, 1941.**]

Magistrates—Appeal—Case stated—Application to state a case—One application where six informations—Summary Jurisdiction Rules, 1915, *r.* 52. *Statutes—Retrospective operation—Amendment increasing penalty—Interpretation Act,* 1889 (*c.* 63), *s.* 38 (2) (*c*), (*d*).

The four defendants were charged with certain currency offences committed between Sept. 3, 1939, and May 11, 1940, and pleaded guilty. The information was dated Aug. 17, 1940. The regulation in force at the time of the commission of the offences limited the penalty for each offence to a fine of £100 or imprisonment for a term not exceeding 3 months or both. On June 11, 1940, an order in council came into force providing for a further alternative penalty of a maximum fine equal to three times the value of the currency in question. The terms of this order were: "Where any person is convicted of an offence against" those regulations, "the maximum fine which may be imposed on him shall be . . . a fine equal to three times the value of the security . . ." The informations against the defendants were six in number, two against two charged jointly and two against each of the others charged separately. There was only one application to the magistrate to state a case and this was headed with the names of all the defendants. The magistrate in fact stated six cases:—

HELD: (i) one application to state a case was sufficient, as the point to be determined was the same in each case.

(ii) the language of the order in council was clear and unambiguous, and was retrospective so as to impose the higher penalty in a case where the offence was committed before, but the conviction was after, the date of the coming into force of that order in council.

(iii) the Interpretation Act, 1889, s. 38 (2), did not apply to this case, since there had been no express or implied repeal of any Act.

[**EDITORIAL NOTE.** It was contended in this case that the amendment could not affect the punishment for an offence which was complete in every respect before the amendment was made. This contention is rejected on the ground that the meaning of the order in council is plain and is not in any way ambiguous. Upon its plain meaning, it refers to convictions after the date at which it came into force, and it is, therefore, immaterial that the offence was committed before that time.

AS TO RETROSPECTIVE EFFECT, see HALSBURY, Hailsham Edn., Vol. 31, pp. 513-516, para. 670; and FOR CASES, see DIGEST, Vol. 42, pp. 693-697, Nos. 1083-1138.]

Cases referred to:

(1) *Grocock* v. *Grocock*, [1920] 1 K.B. 1; 42 Digest 705, *1219*; 88 L.J.K.B. 1068; 121 L.T. 466.

(2) *R.* v. *Chandra Dharma*, [1905] 2 K.B. 335; 52 Digest 699, *1158*; 92 L.T. 700; *sub nom. R.* v. *Dharma*, 74 L.J.K.B. 450.

(3) *R.* v. *Jackson* (1775), 1 Cowp. 297; 42 Digest 766, *1930*.

CASES STATED by the Chief Magistrate of the Metropolis under the Summary Jurisdiction Acts, 1857 and 1879, for the opinion of the

King's Bench Division of the High Court. The facts are fully set out in the judgment of Humphreys, J.

Valentine Holmes for the appellant.

G. D. Roberts, K.C., and *T. Christmas Humphreys* for the respondents.

Humphreys, J.: Six informations were laid at Bow Street Police Court against certain persons as follows. Two informations were laid against Antony Ernest Lamb and Bertrand Lamb jointly (they may be treated as one individual for the purpose of this point) two informations were laid against Antony Lamb (a different person from Antony Ernest Lamb), and two informations were laid against Richard Lamb. Those informations were similar in form. Three of them alleged offences against the Defence (Finance) Regulations, 1939, reg. 5 (1), and three of them were laid under reg. 5 (2) of those regulations. All the informations were heard, by consent, at the same time, and in regard to each of them the persons who were summoned admitted the truth of the information, whereupon the only matter which the magistrate had to consider was the question of penalty.

Counsel for the respondents has drawn our attention to the Summary Jurisdiction Act, 1857, which originally gave power to a court of summary jurisdiction to state a case for the opinion of this court. That statute provides by sect. 2 that, after the hearing and determination of an information by a court in a summary way, either party, if dissatisfied with the determination as being erroneous in point of law, may apply in writing to the justice or justices to state and sign a case. That statute was amended and a wider power was given by the Summary Jurisdiction Act, 1879. Sect. 33 of that Act, besides giving further powers, which it is unnecessary to enumerate for the purpose of dealing with this preliminary point, leaves to rules to be made under the Act the question of how that application, which was said in the statute of 1857 to be an application which must be in writing, should be made. Rules were made in 1915 and r. 52 of those rules provides as follows:

> An application to a court of summary jurisdiction under the Summary Jurisdiction Act, 1879, s. 33, to state a special case shall be made in writing.

Counsel for the respondents says: "In this case, there being six informations, there was, to put it against me at the highest, only one application in writing to state a case, and, therefore, at least as regards five of those informations, the magistrate had no power to state a case, and, therefore, this court has no power to hear those cases at all." He goes on—and for my own part I am disposed to agree with this part of his argument—to say that, if he is right in saying that in regard to five out of the six informations there was no application in writing, the one application in writing which does exist cannot be allocated at the pleasure of the court, and still less of the appellant in this case, who was the prosecutor in the court below, to any particular information, and it would follow that there was no application in writing.

The document in question is before this court. It is a document which is addressed to the chief magistrate at Bow Street Police Court, is in proper form, and recites as follows:

> Whereas an information wherein I, the undersigned [the Director of Public Prosecutions], was informant was heard before and determined by [the court], now I, the undersigned, being dissatisfied and aggrieved with your determination upon the hearing of the said information as being erroneous in point of law, hereby . . . apply to you to state and sign a case . . .

That document, however, is headed: The King v. Antony Ernest Lamb, Bertrand Lamb, Antony Lamb and Richard Lamb." Inasmuch as there was no information, as the magistrate would, of course, know and remember, which included all those names, it follows that this was an application in respect of more than one information, and must be read as such, and must at least be read as being an application to the magistrate to state a case at the instance of the Director of Public Prosecutions as to the summonses against four people who were summoned in respect of different informations, and not the same information, and, therefore, was an application in regard to three informations. However, the difficulty which arises, says counsel for the respondents, is that against each of those individuals (treating the first two as one individual, as I have said, because they were jointly charged) there were two informations. The question arises, therefore, whether that document can reasonably be construed as being an application to state a case in regard to all the informations, which in fact raised only one point, and the same point in every case—namely, the maximum penalty which the magistrate had power to inflict in the circumstances. It is to be observed that the magistrate and those who had to deal with this matter were under no misapprehension as to the intention of the prosecution, the present appellant, in asking for cases to be stated, because in fact three cases have been stated dealing with all six informations. That was undoubtedly the intention of the then prosecution.

In my view, the only point which really could be made in support of this preliminary objection would be if in law the magistrate were unable to state one case in respect of more than one information, so that there had to be six cases stated in respect of the six informations. In that case, there might be something to be said for the allegation that there must be in terms, though not necessarily in different documents, application for six separate cases.

It is quite unnecessary that there should be six cases, and, indeed, it is conceded in this matter that three cases are quite sufficient, because two informations relate to the same point, and may be included in one case for the opinion of this court. For my own part, I know of no reason why half-a-dozen different cases heard by the same magistrate on the same day against different people should not be included in one case stated, assuming always, of course, that they raise precisely the same point. I think that the matter is made even more clear when one realises that there is no statutory form for the application to state a case. Ancient textbooks, as well as modern editions of those textbooks, all agree, apparently, that the practice always has been to make the application in the vaguest possible form. It has not been the practice to mention the particular information which is referred to, and it is not mentioned in this form. It is not even necessary to state the point A of law which it is desired to raise. Those who are familiar with these matters know that it is quite common practice for a magistrate to whom an application to state a case is made to reply: "I will state a case if you will satisfy me that some point of law was raised and tell me the point of law upon which you want me to state a case." Until that B is done, however, this vague form is regarded as sufficient. That is because all that is required is that, within the time which is stated in the rule as the limit of time, and which is now seven days, an application in writing must be made to the magistrate asking him to state a case in regard to the matter which he has decided. My view is that the document C in question in this case can be reasonably construed, as I think it must be taken to have been construed by the magistrate, as being an application to him in writing to state a case upon each of the informations which were heard by him upon the same day against those persons whose names appear at the head of the application made to him—namely, Antony D Ernest Lamb and Bertrand Lamb, Antony Lamb, and Richard Lamb—and I think that the preliminary point accordingly fails.

I now turn to the point upon which the magistrate did state these three cases. We have been told that it is sufficient for this court to deal with one of those three cases, inasmuch as they are identical in form, E subject to the fact that different figures both of the alleged maximum penalty which could have been enforced and the amount of penalty which was in fact imposed by the magistrate. Otherwise the cases are *totidem verbis*. I am taking the case stated in the case of Antony Ernest Lamb and Bertrand Lamb. The case states that there were F against those two persons two informations, the first one being for the offence which may be shortly stated as being that they, being persons who were entitled to sell certain foreign currency, failed to offer that foreign currency for sale to His Majesty's Treasury, while the second information charged that they, being persons who were entitled to assign G the right to receive outside the United Kingdom and the Isle of Man, in respect of a credit or balance at a bank, payment of certain foreign currency, failed to do all things necessary for the purpose of assigning that right to His Majesty's Treasury. As to each of those, as we know, the respondents admitted the truth of those informations, and the magistrate H had nothing to do but to apply his mind to the question of the appropriate penalty to inflict in the circumstances.

Those matters came before the magistrate upon Sept. 4, 1940. The informations had been laid, we were informed (though it does not appear from the cases stated), upon Aug. 17, 1940. The offences were alleged to have been committed between Sept. 3, 1939 (the day when the Defence

(Finance) Regulations, 1939, came into force), and May 11, 1940, that being the date, as we were told, when in fact disclosure was made by the then defendants. Upon Sept. 4, 1940, therefore, the magistrate, looking to see what his powers were in the matter, would find them contained in the Defence (Finance) Regulations, 1939, reg. 9 (3), which provides as follows:

> Where any person is convicted of an offence against any of these regulations in relation to [amongst other things, currency], the maximum fine which may be imposed on him shall be such fine as is authorised by para. (*a*) . . . of reg. 92 of the Defence (General) Regulations, 1939, or a fine equal to three times the value of the security, currency . . . whichever is the larger.

The Defence (General) Regulations, 1939, reg. 92, which is the regulation which provides penalties for any breach of those regulations, provides as follows:

> If any person contravenes or fails to comply with any of these regulations . . . he shall be guilty of an offence against that regulation; and, subject to any special provisions contained in these regulations, a person guilty of an offence against any of these regulations shall —(*a*) on summary conviction, be liable to imprisonment for a term not exceeding three months or to a fine not exceeding £100, or to both such imprisonment and such fine . . .

It will be observed that on Sept. 4, 1940, there is an additional power which is provided in this way. There is no alteration of the power as to imprisonment, and no alteration as to the power to fine up to £100, but, as an alternative to fining £100, there is a power to impose a fine equal to three times the value of the currency, or whatever it may be which is the subject of the breach of the regulation, whichever is the larger.

That additional power to inflict a fine in that way comes from an order in council. The order in council, which itself was made under an Act which gave authority to His Majesty in Council to make such regulations, is dated June 11, 1940, and altered the law as from that date. The law was altered, therefore, at a date considerably prior to the laying of these informations, and, of course, to a greater extent prior to the hearing of those informations. The order in council provides as follows:

> The Defence (Finance) Regulations, 1939, reg. 9, shall be amended as follows . . . at the end of the regulation there shall be added the following paragraph . . .

Then follows the first of the two paragraphs which I have just read. Those are the matters which are set out and referred to in the case stated.

The magistrate, having set out those matters, further mentioned that, under the provisions of reg. 9, as amended, the maximum fine which could have been imposed upon these two men and each of them in respect of each of these joint informations would appear to be something like £158,000, so great was the extent to which they had disregarded the provisions of the regulation. It must have been in fact currency of the value of something over £50,000, because one has to multiply that by three to see what the maximum fine is. He says that the maximum fine would have been £158,000 in regard to each of these informations. He goes on in para. 10 of the case as follows:

> On the part of the respondents it was contended that the offences with which the respondents were charged were complete prior to June 11, 1940, the date on which the said order in council was promulgated, and that accordingly in imposing a fine my jurisdiction was limited to a maximum fine of £100 in respect of each offence . . .

That is stated in the original form of the Defence (General) Regulations, 1939, reg. 92. Then in para. 12 he says:

> Being of opinion that the contention on the part of the respondents was correct, I imposed upon the said respondents [each of them, the maximum penalty prior to the amendment of reg. 9 on June 11, 1940, that is, £100 in respect of each offence and certain matters of costs]. If I had been satisfied that the contention on the part of the appellant was correct, I should have had to consider the propriety of imposing considerably heavier fines on each of the respondents in respect of each such offence.

The contention on the part of the appellant was, of course, that the magistrate had power to impose that which the law, as it existed at that date, stated that he had the power to impose—namely, not only a fine of £100, but, if he thought right, as an alternative to that, a fine amounting to not more than three times the amount of the currency which they failed to hand over to the Treasury in respect of each offence.

In my opinion, the magistrate was wrong in the view which he took as to his power in the matter. He failed, in my opinion, to give effect to the perfectly plain and quite unambiguous terms of the regulation which defines his powers in the matter. I cannot myself conceive of any language which is less open to discussion than this:

> Where any person is convicted of an offence against any of these regulations in relation to [certain matters], the maximum fine which may be imposed on him shall be [certain things, one of such things being] a fine equal to three times the value of the security, currency . . .

In my view, this case falls to be decided simply and solely upon those perfectly plain words. I think that the duty of the magistrate was to take into consideration whether, in the circumstances of the case, he ought to send these persons to prison, or whether he ought to fine them, and, if so, what amount not more than three times the value of the currency he thought it right to impose.

The magistrate, however, seems to have been persuaded that there was some doctrine which would prevent him from reading the terms of that regulation in their ordinary sense. The doctrine to which his attention was called, as one gathers from the authorities which are said to have been quoted to him, and some of which have been quoted to us, is very well known indeed. I think that it may be put in these words—namely, that, where a statute alters rights of persons, or creates fresh liabilities in regard to persons, or creates or imposes obligations upon persons and thereby alters the law, such a statute ought not to be held to be retroactive in its operation unless the words are clear, precise and quite free from ambiguity. For such a proposition there is the most ample authority. I will take only two cases in which the matter has been discussed in this court in recent years. The last occasion on which it was discussed, so far as I am aware, was in 1920 in *Grocock* v. *Grocock* (1), when the court had to deal with that doctrine in relation to the powers of a person who had obtained a maintenance order to recover arrears under the order, having regard to a statute which had removed those orders from amongst the things in regard to which there was a time limit in respect of recovery of arrears.

The second case is *R.* v. *Chandra Dharma* (2), a very well known leading case upon the subject, specially stated for the consideration of the Court for consideration of Crown Cases Reserved in 1905. The judgment of LORD ALVERSTONE, L.C.J., and that of CHANNELL, J., state the propositions to which I have referred quite clearly and succinctly, and, as counsel for the respondents has quite correctly said, there are many other authorities to the same effect. However, each and all of these authorities depends upon the fact that there must be in the language of the statute something which is at least arguable upon the question of whether or not the statute is to be deemed to be retroactive in its operation, and none of those authorities doubts, or could suggest any doubt upon, the undoubted right of Parliament to make any statute in any terms which it thinks right, and equally the right of an order in council, so long as it is *intra vires* the statute which authorises it, to make any such alteration in the law as is thought right at that time. That doctrine, while I fully subscribe to it, and would willingly give full effect to it in any case where it was possible to do so, to my mind has no effect at all in a case where the language of the statute, or, as in this case, of the order in council, is plain and can mean only that which it says. For that reason, without referring further to that doctrine, or to the many cases which have been decided under it, I take the view that the magistrate was wrong in considering that that doctrine hampered him in any way from giving effect to the perfectly plain language of this order in council. To my mind, it was totally immaterial for him to consider what would have been the result and what would have been his powers if this matter had come before him six months earlier than it did. It had nothing to do with it. He was sitting on Sept. 4, and all that he was concerned with was his powers on that date. In my opinion, his powers are perfectly clearly stated in that regulation into which the paragraph in question had been incorporated ever since the previous June 11.

Out of respect for the argument which has been addressed to us by counsel for the respondents, I think that I ought also to deal with the second limb of his argument. He relies upon the Interpretation Act, 1889, s. 38 (2), which provides as follows:

> Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . (*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or (*d*) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed . . .

Therefore, counsel for the respondents argues that this order in council has repealed the Defence (Finance) Regulations, 1939, reg. 9, and that, having repealed it, that repeal is not to affect any penalty which has been incurred in respect of any offence committed against that enactment so repealed.

In my view, the Interpretation Act, 1889, s. 38, has no sort of relation to this matter. I think that, boldly though counsel for the respondents has approached his fences in this matter, he has found them too many and too formidable. In the first place, it will be observed that the provision is this: "Where this Act or any Act passed after the commencement of this Act repeals . . ." What Act has repealed anything? This is not an Act. That which has effected any repeal, if there is a repeal here, is not an Act at all. It is an order in council. This section itself draws a clear distinction between an Act of Parliament and an enactment. An "enactment" may mean something other than an Act of Parliament, but an Act means an Act of Parliament. This first point, which seems to me to be fatal to the argument of counsel for the respondents, is that there is no Act here which has, or pretends to have, repealed anything at all.

The next point is this. Assuming that the order in council is an Act, one asks oneself whether or not it has repealed some enactment, and, if so, what. One looks at the terms of it, and what it purports to do is not to repeal anything at all. What it says is this:

> His Majesty, in pursuance of [various powers] is pleased, by and with the advice of His Privy Council, to order and it is hereby ordered that the Defence (Finance) Regulations, 1939, reg. 9, shall be amended as follows . . .

Where is there room for the argument that reg. 9 has been repealed? There is none. If reg. 9 has not been repealed, has anything else been repealed? I am not quite sure whether the argument goes so far as to say that the Defence (General) Regulations, 1939, reg. 92, has been repealed. Quite obviously, it has not. If it has, there is no sanction to be found in the whole of the defence regulations for all the offences which are committed daily against them, for that is the general regulation which gives general power to punish any infraction of any regulation by fine or imprisonment. It could hardly be a serious argument, I think, that that has been repealed.

Again, as I have said, with great respect to the argument of counsel, in this matter I can only say that I find it quite impossible to get from the Interpretation Act, 1889, s. 38, anything which in any way limits the power of His Majesty in Council to do that which has in fact been done, and to amend the terms of a regulation in regard to the maximum penalty enforceable.

That being so, it is unnecessary to discuss whether, if one were to assume that there was by some Act of Parliament a repeal of reg. 9, that can be said to "affect any right, privilege, obligation or liability" or "any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed." In my view, that statute has no application at all to this matter, unless, indeed, it can be said that there is a general rule according to the law of this country that the alteration by statute, or by regulation or order having the force of a statute, of the previous law in regard to a penalty effects a repeal. I can only say that the authority of LORD MANSFIELD, great authority as it is, appears to be to the contrary effect. In *R.* v. *Jackson* (3), to A which we were referred, LORD MANSFIELD, C.J., declaring the opinion of himself and the other members of the court, observed, at p. 298:

> Now it is a general rule that subsequent statutes, which add accumulative penalties, do not repeal the former statutes.

In the result, in my opinion, the question which is asked in para. 13 of the case should be answered in the negative, and the cases should go B back to the magistrate with a direction to that effect.

TUCKER, J.: I agree with what HUMPHREYS, J., has said with regard to the preliminary point taken by counsel for the respondents, and do not desire to add anything in respect thereof.

C As to the cases themselves, the first point to which I desire to refer is the submission of counsel for the respondents that the Interpretation Act, 1889, s. 38, applies in this case. I think that, for a number of reasons, sect. 38 has no application. It is sufficient for me to indicate what, in my view, are some of those reasons. The particular subsections D upon which counsel relies are sect. 38 (2) (*c*), (*d*), and they provide as follows:

> Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . (*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or (*d*) affect any penalty, forfeiture, E or punishment incurred in respect of any offence committed against any enactment so repealed . . .

In the first place, I do not think that there has been any repeal. There clearly has been no express repeal, but counsel for the respondents argued that the provisions of reg. 92 were impliedly repealed by the order in F council of June 11, 1940. When one refers to the order in council of June 11, 1940, it appears that the order provided that "the Defence (Finance) Regulations, 1939, reg. 9, shall be amended as follows." Then there appear, under the heading (*c*), words which impose the increased penalty. The Defence (General) Regulations, 1939, reg. 92, is nowhere G referred to, and reg. 92 still has full force and effect, and, in my view, it has not been repealed, either expressly or impliedly. What has happened has been that a different regulation altogether—namely, the Defence (Finance) Regulations, 1939, reg. 9—has been amended in the manner set out in that order in council.

H Furthermore, in my view, the Interpretation Act, 1889, s. 38 (2) (*c*), is not dealing with a case such as the present at all. I do not think that the words "any right, privilege, obligation or liability acquired, accrued or incurred" are applicable to a penalty which has been imposed, or to a fine which has been inflicted, for a criminal offence.

With regard to para. (*d*), I think that there is a further difficulty. The words are, as I have already said:

> . . . affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed . . .

I think that those words presuppose that some penalty or punishment has been inflicted before the repealing enactment has been passed, and, in this case, even supposing that there had been a repeal, the penalty was inflicted subsequent to the repeal, and I do not think that that is a situation contemplated by that subsection. For these reasons, I think that the point of counsel for the respondents under the Interpretation Act, 1889, fails.

I turn now to the point which I regard as the much more serious point and one which I think merits investigation and serious consideration. There counsel for the respondents relies upon what he says is the recognised principle—namely, that, without clear words, a statute will not operate to create new obligations with regard to matters which are complete—and he relies upon the words used by LORD ALVERSTONE, L.C.J., in *R.* v. *Chandra Dharma* (2), at p. 338 :

> . . . unless the language is clear, a statute ought not to be construed so as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time when the Act came into force. . . .

It is agreed that that is the principle applicable, and that, when one is dealing with criminal matters, that principle should be very strictly applied. We are here dealing with a criminal matter. Counsel for the appellant contended that this amendment had not had what is commonly called a retrospective effect, although, if I may say so, I agree that the word "retroactive," used by HUMPHREYS, J., is more correct. I use the word "retrospective" merely for convenience, as it has so often been used. Counsel for the appellant says that this amendment, which is now incorporated in the Defence (Finance) Regulations, 1939, reg. 9, uses the words, "Where any person is convicted of an offence," and, having come into force on June 11, it is dealing with a future state of affairs—namely, a conviction in the future. It is not creating any new offence. It is dealing with an existing offence, and, therefore, he says, there is nothing retrospective about it at all.

I am unable to agree with that submission. It is true that, so far as the creation of any substantive offence is concerned, it is not retrospective. It is not making an offence of something which previously was not an offence, and it is, of course, dealing with the future when it says, "Any person is convicted," and is not referring to any person who has been previously convicted. However, where I think that it has a retrospective effect is with regard to the penalty which it imposes. If we suppose that next week the regulation with regard to looting were to be amended by a provision which said, "Any person convicted of looting shall suffer the penalty of death, and regulation so-and-so shall be amended accordingly," I think that it would be difficult to persuade anybody who was next week convicted of the offence of having looted six months ago that that regulation had not a retrospective effect. I think that it clearly would have retrospective effect *qua* punishment, and I think that this regulation has a retrospective effect with regard to the penalty which it imposes.

That merely throws us back upon the application of the principle to a case of this kind, which is a case rather different from any of those in the authorities to which we have been referred. One has to look at the regulation and see the language which has been used. When one finds the regulation dealing with what was then an existing and known offence and dealing with a person's future conviction of that offence, and when it uses the simple, plain and clear language that any person convicted of that offence shall be liable to certain penalties, I think that it is clear that the language used is in terms applicable to an offence which has already been committed. It is not a case of a regulation creating any new offence, nor is it, for that matter, a regulation providing for some different kind of penalty or punishment altogether. It is merely increasing the amount of a monetary fine. In my view, the words are clear, and, although I do not altogether like the idea of punishments being increased after the offences have been completed, none the less, if the language is clear, and if that is the result, I think that it is impossible to escape from the consequences of the language which has been used.

For those reasons, I agree that these cases must go back to the magistrate in order that he may apply his mind to the question of whether, in all the circumstances, these cases, or any of them, are cases in which he should impose the increased penalty which is provided by this amended regulation.

CASSELS, J.: I agree, and desire to add only a very few words. Upon the preliminary point, I am satisfied that the notice in writing which was given in this case was a sufficient compliance with the rules.

With regard to the substantial point which was raised, I confess that at first sight I did not like the idea that a man who has committed an offence may find himself not liable to a punishment which existed at the time when the offence was committed, but liable to a punishment which has recently been made the law and was the law when the trial took place. As to the retrospective, or retroactive, effect of a statutory provision, *dicta* are to be found in a large number of cases which clearly indicate that, if the language is plain and not ambiguous, the Act may well have a retrospective effect.

When I look at the language of this regulation, I come to the conclusion that it is perfectly plain, that there is not the slightest ambiguity about it, and that, when these respondents, who between Sept. 3, 1939, and May 11, 1940, admittedly committed offences against the Defence (Finance) Regulations, 1939, found themselves on Sept. 4 before the magistrate at Bow Street, they were upon that day quite plainly liable to penalties which the law prescribed from June 11 for this particular offence.

Order that all three cases be remitted to the magistrate with an order that *in the opinion of the King's Bench Division of the High Court, the magistrate was entitled to have regard to the provisions of the Defence (Finance) Regulations*, 1939, *reg*. 9, *as amended by the order in council, and for a direction for him further to consider the question of penalty generally.*

Solicitors : *Treasury Solicitor* (for the appellant) ; *A. M. Longhurst & Butler* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law*.]

CAULFIELD *v.* P. W. PICKUP, LTD.

[Manchester Spring Assizes (Asquith, J.), **May 12, 13, 1941.**]

Mines—Coal mine—Statutory regulations of mines—Provisions as to safety—Support of roof—Coal Mines Act, 1911 (*c*. 50), *ss*. 49, 50, 102 (8)—*General Regulations*, 1913 (*S.R. & O.*, 1913, *No*. 748), *regs*. 6, 7, 8.

The deceased was killed by a fall of stone from the roof of a mine. The mine was one in which the coal was being won by mechanical cutters and placed on a conveyor belt for transmission along the haulage roads. The deceased was sent to clear away certain small coal or scuftings which obstructed access to the coal face. These prevented the deceased from seeing how the roof was supported, but in fact it was supported by one prop supporting a disc of wood of slightly greater diameter than the prop itself. It was contended that, under the Coal Mines Act, 1911, s. 50, and the General Regulations, 1913, reg. 6, the duty systematically and adequately to support the roof was upon the workman. It was found as a fact that the system of props and bars gives more support than that of props and lids, and that, if that system had been adopted in this case, the accident would not have happened :—

Held : (i) the effect of the Coal Mines Act, 1911, s. 50, and the General Regulations, 1913, reg. 6, is not to place the duty of properly supporting the roof upon the workman.

(ii) the defendants had not shown that it was not reasonably practicable to avoid or prevent a failure to comply with the provisions of Sects. 49 and 50.

(iii) the deceased had not been guilty of contributory negligence. There was no duty upon him, when he became aware of the fact that the roof was supported only by a lidded prop, to tell the deputy fireman that some further method of support was necessary.

[**EDITORIAL NOTE.** This case concerns the construction of certain sections of the Coal Mines Act, 1911, and certain of the General Regulations, 1913. The statute and regulations have to be made in general terms and from time to time difficult questions arise upon the application of those general enactments to the actual conditions in a mine. The matters discussed here in relation to this specific case are of general interest and importance to the coal mining industry.

As to Support of Roof of Mine, see HALSBURY, Hailsham Edn., Vol. 22, pp. 798-800 ; paras. 1646, 1647 ; and for Cases, see DIGEST, Vol. 34, p. 744, No. 1189.]

Case referred to :

(1) *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C. 1 ; Digest Supp. ; 102 L.J.P.C. 123 ; 149 L.T. 526 ; 26 B.W.C.C. 463.

ACTION by a widow under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846, in respect of the death of her husband in a colliery accident. The facts are fully set out in the judgment.

Wilfrid Clothier, K.C., and *A. E. Baucher* for the plaintiff.

G. J. Lynskey, K.C., and *A. Denis Gerrard* for the defendants.

ASQUITH, J.: The plaintiff brings this action under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846, for damages in respect of the death of her husband, which she alleges was caused by negligence or breach of statutory duty on the part of the defendant company.

The facts, so far as they are undisputed, are these. The deceased man was a collier and at the material time was employed by the defendants. The defendants were colliery proprietors working the Lower Mountain seam in East Lancashire. The seam in question is a 2 ft. seam, and in this colliery the coal is won by mechanical cutters and placed on a conveyor belt for transmission by the haulage roads. At 11.45 a.m., the deceased, who was working at No. 3 machine face, was sent for by one Bray, a deputy fireman employed by the defendants, and was required to do certain work at No. 2 machine face, of which Bray was then in charge. The deceased was required by Bray to remove certain small coal or scuftings obstructing access to machine face No. 2, and, after he had been working for about half-an-hour, owing to a slip or break in the roof under which the deceased was working, a large stone, weighing 1½ tons and measuring 4 ft. by 4 ft. 6 ins., fell upon him and caused his death.

The substantial issue in the case is whether the defendants are liable, by reason of negligence or breach of statutory duty, for their failure to ensure that the roof was properly supported and secured. The roof in the immediate neighbourhood of the place where the stone fell is supported by pit-props between each of which and the roof is a disc of wood called a lid. This lid is of slightly greater diameter than that of the prop itself, and is intended to widen the area of support given. The main complaint of the plaintiff is that this system of support is—or was, in the circumstances obtaining near this coal face—inadequate and unsafe, and that, instead of each prop being capped with a lid, horizontal bars of wood should have been laid so as to bridge the top of each prop with the top of the adjoining prop. It is common ground that, although bars are in use for this purpose in some places, even in this case, they were not used at the point where the accident occurred.

The plaintiff, in the particulars of negligence and breach of statutory duty, relies, as regards negligence, on the alleged failure by the defendants to provide a safe working system, and, as regards breach of statutory duty, upon alleged breaches of the Coal Mines Act, 1911, ss. 49, 50, 51, 64, 65. In fact, I do not think that in this case there are two independent causes of action, common law negligence and breach of statutory duty.

The Act of Parliament seems to me to be an exhaustive statutory definition of what constitutes a safe working system so far as coal mines are concerned, and the case was argued—rightly, as I think—on the terms of the Act itself.

The defendants deny negligence and breach of statutory duty, and set up negligence and breach of statutory duty on the part of the deceased workman. In their particulars, they rely specifically on (i) his alleged failure to comply with certain systematic timbering rules made under the Coal Mines Act, 1911, s. 50 (4), and posted at the surface of the pit, (ii) his alleged failure to comply with another notice posted on the pit brow, and (iii) his alleged failure to observe regs. 6, 7 and 8 of the general regulations made under sect. 86 of the Act so far as the plaintiff bases her case on sect. 50. They further contend that reg. 6 referred to above imposes on the workman the obligation to carry out the requirements of sect. 50. Finally, they rely on sect. 102 (8) of the Act, of which more hereafter.

The case raises a difficult question both in fact and in law. I will first state my findings on two of the more important issues of fact. First, I find that the system of props and bars (other things being equal, such as the distance between each prop and its neighbour) gives more support to the roof than that of props and lids, that, if it had been adopted in this case (assuming that its adoption was practicable), the accident would have been avoided, and that it ought to have been adopted. Two experts called for the plaintiff gave evidence to this effect. No strictly expert evidence was called for the defendants. They called their manager and deputy fireman, both men of practical but limited experience, and naturally neither of them quite impartial. I was not favourably impressed by the evidence of the manager, and the deputy fireman had given evidence at the inquest which I think supports my finding, and which he had substantially to reaffirm in the witness-box. Secondly, I find that the presence of the large stone in the roof was a latent defect which neither the employer nor the workman could have discovered by any reasonable method of examination open to them. The fact that such latent defects are not uncommon is one reason why the bar system of support should be adopted whenever possible. The negligence or breach of duty, if any, in this case does not consist in failing to detect the stone, but in failing to supply a method of roof support which would obviously be demanded by this.

The provisions of the Coal Mines Act, 1911, relied upon by the plaintiff are, so far as is relevant, sect. 49 and sect. 50 (1), (4), (7). In addition, the plaintiff relied on sects. 51, 64 and 65. I think that there was no breach of sect. 51. As to sects. 64 and 65, which relate to the duties of the firemen or their deputies to inspect and ascertain the condition of the mine in relation, *inter alia*, to its roof from the point of view of safety, unless there was also a breach of sect. 49 or 50, I think that there was no breach of sects. 64 and 65. The question really is whether there was a breach by the defendants of sects. 49 and 50. Section 49, omitting immaterial words, provides as follows :

> The roof . . . of every . . . working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing . . . work in any . . . working place which is not so made secure.

Then sect. 50 provides as follows :

> (1) Where props or props and bars or chocks are used to support the roof at the working face, the roof under which any work of getting coal or filling tubs is carried on shall be systematically and adequately supported, and the props or chocks shall be set at such regular intervals and in such manner as may be specified in the notice hereinafter mentioned . . . (4) The manager shall, by notice, specify the manner in which the supports are to be set and advanced, and the maximum intervals to be observed on roadways between the supports, and at the face (*a*) between each row of props ; (*b*) between adjacent props in the same row ; (*c*) between the front row of props and the face ; (*d*) between the holing props or sprags ; (*e*) between chocks : Provided that the interval between holing props or sprags shall in no case exceed 6 ft. . . . (7) Nothing in this section shall prevent a workman from setting supports in his working place at more frequent intervals than those specified in the notice aforesaid, where necessary for safety.

Section 49 was considered by the House of Lords in *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan* (1). That case, and other decisions binding on me, have decided (i) that the obligation which the section defines is imposed upon the employer, (ii) that, subject to the possible operation of sect. 102 (2), the obligation is absolute, (iii) that it is a personal obligation, in the sense that the employer cannot avoid liability or a breach by saying that he has delegated its performance to competent subordinates, and (iv) that the doctrine of common employment cannot be set up in answer to a breach.

If sect. 49 were the only provision to be considered, the defendants would have no answer to this claim. They are liable if the roof is not secured, and the fall of the stone in itself shows that the roof was not secured. However, sect. 49 is not the only section to be considered. The defendants rely on three other provisions as qualifying the operation of sect. 49—namely, (i) sect. 50, (ii) reg. 6, and (iii) sect. 102 (8). I have read sect. 50, so far as it is material. Reg. 6 provides as follows :

> Where the work of erecting the supports of the roof and sides of working places is done by the workmen employed therein, it shall be the duty of the workmen to carry out the requirements of sect. 50 of the Act, and to comply with the directions contained in the notice required by that section.

The notice required by that section was in fact posted up in the mine, giving the maximum distances between the pit props. It was argued for the defendants that, although sect. 49 imposes the obligation to ensure that the roof is secure, and imposes it upon the employer, where props are used at the face, the section which applies is sect. 50, that, under sect. 50, the obligation is in substance transferred to the workman, and that this appears from reg. 6. It seems to me that this argument is ill-founded. Sect. 50 in terms imposes certain obligations on the employers. For instance, by sect. 4 it is the manager who shall by notice specify the maximum distances between the pit props, rows of props, and so on. It is no doubt contemplated that the workman will often—perhaps generally—be employed to erect such props. When this is so, reg. 6 applies, and provides that the workmen are to carry out the requirements of sect. 50 and comply with the directions contained in the notice. That is to say, they are not to set the props further away than the maximum distances prescribed by the notice, and no doubt they must also comply with subsect. (2), for instance, by setting the props or sprags as soon as it is practicable. No doubt, again, they have liberty under subsect. (7) to set props at more frequent intervals than those provided as maxima in the notice, but to argue from all this that—where props are used, at any rate—the employer is relieved of his duties under sect. 49 and that the whole obligation of seeing that the roof is systematically and adequately supported under subsect. (1) passes to the workmen seems to me unwarrantable. At any rate, to rely on reg. 6 as having that effect in the present case would, I think, be unreasonable, since, although the work of erecting the supports at the material working place may have been done by the workmen, the deceased was not one of these workmen. He was summoned to this place from a different part of the mine, and had to take it as he found it. Therefore, I reject the argument founded on sect. 50 and reg. 6.

The real issue seems to me to be this. *Prima facie*, the mere fact that the roof fell makes the defendants liable under sect. 49. Are they absolved, on the facts of this case, either by sect. 102 (8) or by some form of contributory negligence or breach of statutory duty on the part of the deceased workman ? Assuming my finding to be right that props and bars were the proper and only safe method of roof support in this case, and that sect. 49 had been broken by its non-adoption, have the defendants shown that it was not reasonably practicable to avoid or prevent the breach ? I find that they have not. It is true that, on the morning of the accident, it was difficult to see what, if any, method of support had been employed in this case. Access to that part at that time was barred for the last 6 ft. leading to the face by an accumulation of scuftings or small coal the presence of which resulted from the operation of the mechanical cutter. That was what the deceased was sent to clear away, but the defendants' deputy fireman, a specialist in safety devices, had seen this face the evening before, when there was no such accumulation, and must have seen that the system of props and bars was not adopted for the roof opposite this point in the face. In fact, the roof over this last 6 ft. was supported by a single prop capped with a lid.

There might be some difficulty in applying the system of bars so far as the bars would be at right angles to the face, but I am satisfied that this was not reasonably practicable. There could be no difficulty in using props with bars running parallel to the face. Indeed, the plan at its bottom righthand corner shows such a pair of props with a bar 2 ft. from the coal face at a point not far from the scene of the accident. If there had been such a pair of props with a bar at the scene of the accident, the accident would not, I am satisfied, have occurred. As I say, the last 6 ft. leading up to the face had been inspected on the preceding evening by the deputy fireman, a statutory officer whose duty it was on behalf of the defendant employers to ensure the safety of the roof above that 6 ft. This portion of the roof was then, and later continued to be, supported by a single prop with a lid.

On my findings, the deputy fireman was negligent in not seeing that the bar system was applied at this working face. As I say, he is an expert on safety matters. The deceased knew that the deputy fireman had inspected this place when its condition was visible. The deceased himself was not summoned to the scene until the next day, and, when he started working, the nature of the support to the roof was rendered invisible by the scuftings which filled up the whole of the 6 ft. from roof to floor, and, until the deceased had worked there for some time, he would not come across the solitary lidded prop. He therefore committed no breach of reg. 5, which requires a workman to examine his working face carefully before commencing work. If, again, he had encountered evidence of the presence of the stone in the roof as he worked his way along, he ought, in compliance with reg. 7, to have reported this as a dangerous defect to the deputy fireman, or should have taken steps to have it remedied. His duty is emphasised in one of the notices posted at the pit brow, but the stone gave no evidence of its presence. For similar reasons, I do not think that he failed to comply with the notice. This narrows the scope of his possible delinquency. If and when he arrived at the lidded prop, he was not required by any of the sections, regulations or notices relied on, or by considerations of common sense, to tell the deputy fireman that the system of lids as opposed to bars was wrong and to cause the one to be substituted for the other at this point.

I therefore hold (i) that there was a breach by the defendants of sect. 49 and also of sect. 50 (1), (ii) that it was reasonably practicable for the defendants to have prevented a breach of these sections, so that sect. 102 does not avail them, and (iii) that there was no contributory negligence or breach of statutory duty by the deceased. It follows that the defendants are liable.

Solicitors: *Oddie & Roebuck*, Blackburn (for the plaintiff); *Peace & Ellis*, Wigan (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

CUMPER *v.* POTHECARY.

[Court of Appeal (Scott and Goddard, L.JJ., and Stable, J.), **April 23, 24, 25, May 9, 1941.**]

Practice—Payment into court—Money not taken out within seven days—Application to vary amount paid in—Withdrawal of money paid in in whole or in part—Procedure—R.S.C., Ord. 22, rr. 1, 2.

In an action for personal injuries suffered by the deceased, the personal representative claimed certain expenses to which he had been put and damages for loss of expectation of life. The defendant paid into court £10 in respect of the first claim and £1,052 12*s.* 6*d.* in respect of the second, stating that he admitted negligence but denied the damage. The plaintiff did not accept that sum within the 7 days allowed by R.S.C., Ord. 22, r. 2 (1), and, later, when the House of Lords gave their decision in *Benham* v. *Gambling* (1), it became evident that the sum paid in in respect of the loss of expectation of life was much larger than would be recovered in the action. The defendant thereupon took out a summons asking that the money in court should be repaid to him and on the following day the plaintiff applied for leave to accept the sum paid in. Upon these summonses the only order made was that the defendant was given leave to amend his notice of payment in, so that, where it had stated that £1,052 12*s.* 6*d.* had been paid in respect of the plaintiff's claim under the Law Reform (Miscellaneous Provisions) Act, 1934, it now stated that £350 was enough to satisfy that claim, and went on to admit negligence but to deny the damage. The result was that £702 12*s.* 6*d.* had been paid into court with neither an admission nor denial of liability and was not ordered to remain as security for any judgment which the plaintiff might obtain :—

Held : (i) the defendant, having paid money into court, was not at liberty as of right to resile from that step. It was necessary for him to show such a change of circumstances as would put a wholly different complexion on the case. The same considerations applied to the application of the plaintiff for leave to accept the money paid in.

(ii) where a defendant desires to obtain leave to withdraw a payment into court, he should ask for an order that he be at liberty to withdraw his notice of payment in and that the sum in court be paid out to him or be otherwise dealt with as the court may direct.

(iii) where a defendant desires to obtain leave to reduce the payment in, he should ask for an order that he be at liberty to withdraw the notice already served and to substitute therefor a notice containing the reduced amount, and for an order that the difference between the two amounts be repaid to him or be otherwise dealt with as the court may direct.

(iv) notices of payment in should follow the prescribed form, and any qualifications, such as the admission of negligence, should be dealt with in the pleadings.

[**EDITORIAL NOTE.** The Court of Appeal have here stated the procedure where it is desired to withdraw a payment in. Put shortly the point is this There is no absolute right to withdraw a payment in, but such withdrawal may be made with the leave of the court where special circumstances are shown. The examples of such special circumstances given, which are not, of course, exhaustive, are fraud, mistake, and change in the law. Such matters will only arise in exceptional cases, but the decision is important, as it settles the procedure to be followed in such cases. Some complication arose in the present case owing to the improper form of the defence and it is only right to point out that the defence here criticised was not settled by counsel.

As to Payment into Court, see HALSBURY, Hailsham Edn., Vol. 26, pp. 62-64, paras. 100-107 ; and for Cases, see DIGEST, Practice, pp. 481-494, Nos. 1604-1709. See also YEARLY SUPREME COURT PRACTICE, pp. 369-377.]

Cases referred to:

(1) *Benham* v. *Gambling*, [1941] 1 All E.R. 7; Digest Supp.; *revsg.*, [1940] 1 All E.R. 275.

(2) *Frazer and Haws, Ltd.* v. *Burns* (1934), 49 Lloyd's L.R., 216.

(3) *Williams* v. *Boag*, [1941] 1 K.B. 000; [1940] 4 All E.R. 246; Digest Supp.

APPEAL by the defendant from an order of ATKINSON, J., dated Mar. 18, 1941. The facts are fully set out in the judgment of the court delivered by GODDARD, L.J.

Gilbert Beyfus, K.C., and *Humphrey H. Edmunds* for the appellant.

C. L. Henderson for the respondent.

Beyfus: There was no good ground for the indulgence of the judge in making the order allowing the plaintiff to accept the defendant's payment into court after the 7 days had expired. The judge's order as to costs shows that he misconstrued the position. In any case, the plaintiff was out of time. There is no equity in the order, and no reason is given for it. [Counsel referred to *Frazer & Haws, Ltd.* v. *Burns* (2) and *Williams* v. *Boag* (3).]

Henderson: It is a fallacy to say that the sum paid in was refused. [Counsel referred to THE ANNUAL PRACTICE, 1940, Appendix B, Part II. There is no limitation of time in the prescribed form. [Counsel referred to the judgment of DU PARCQ, L.J., in *Williams* v. *Boag* (3).] The court can refuse leave only in case of mistake or fraud. Payments into court are not made on the basis of the sum being reasonable. The object is merely to buy off the litigation. If the court had a discretion, it would mean that it had to consider whether or not the sum was a fair one. Payment in is made with either an admission or a denial of liability. The notice of payment in and the defence, taken together, are bad pleading and could have been struck out. This is not a notice within the order. The plaintiff is entitled to 7 days in which to accept after a valid notice.

Edmunds, in reply.

GODDARD, L.J., [delivering the judgment of the court]: In this case there are two appeals, both by the defendant, from orders of ATKINSON, J., in chambers. In the first, the judge ordered a sum of money which had been paid into court by the defendant to be paid out to the plaintiff, and on this we differ from him. In the second, he refused leave to the defendant to amend his earlier payment into court, and, in our opinion, that order was right. The action is brought by the administrator of Gladys Ruth Cumper, deceased, to recover damages for pain and suffering endured by her as the result of negligent driving of the defendant, and also for her loss of expectation of life, as she died of her injuries 3 days after the accident. There were also two small claims for special damage incurred by the deceased and the plaintiff respectively. The statement of claim was dated Apr. 17, 1940, and claimed against the defendant and also against Frank Thompson (Hauliers), Ltd., and on Apr. 24, before defence, a sum of £1,062 12*s.* 6*d.* was paid into court, ostensibly on behalf of both defendants. This was a mistake, as the payment was intended to be on behalf of the present defendant only. Nothing really turns on this, and it is enough to say that in June, 1940, by agreement between the parties, the matter was put right, and it was agreed that the 7 days within which the money might be accepted by the plaintiff under R.S.C., Ord. 22, r. 2 (1), should run from the date of this agreement. The action afterwards was discontinued against the second defendant. The notice of payment into court was in these terms:

> Take notice that the defendant, Charles Pothecary, has paid into court £1,062 12*s.* 6*d.* and says that £10, part of that sum, is enough to satisfy the plaintiff's personal claim, and £1,052 12*s.* 6*d.*, the other part of that sum, is enough to satisfy the plaintiff's claim under the Law Reform (Miscellaneous Provisions) Act, and admits negligence but denies the damage.

This notice is not strictly in accordance with R.S.C., Appendix B, Form 3. R.S.C., Ord. 22, r. 1 (3), says that the notice of payment into court which has to be served on the defendant shall be in that form, and shall state whether liability is admitted or denied. The plaintiff, however, did not take any objection to the notice, and, as he afterwards applied for the money to be paid out to him, he clearly waived any irregularity. Nor do we think that, in respect of this notice, there is any substance in the objection, because it is clear enough that it intended to deny liability, and the plaintiff was in no way misled. However, we think that it is desirable for defendants making payments into court to adhere strictly to the form prescribed, and, if they desire to deny liability, to say so in plain terms, without any qualifications as to admitting negligence or the like, which should be dealt with in their pleading, and not in the notice. The next step in the action was the delivery of a most embarrassing defence. Although the defendant admitted negligence in his notice of payment in, and by that document left it to be inferred that all that was in dispute was the quantum of damages to which the plaintiff was entitled, he put in issue that the plaintiff was the administrator or the father of the deceased, although he had paid in £10 in respect of the plaintiff's personal loss. Then he did not admit that the deceased sustained much pain and suffering, which can mean only that he admitted that she sustained some. Had an admission been obtained by a notice to admit facts, or an interrogatory that the plaintiff was the administrator and father of the deceased, in our opinion, the defence could be read only as one admitting the cause of action—namely, both negligence and damage—though no doubt leaving the quantum to be assessed. However, the plaintiff did not apply to strike out the defence, apparently assuming that all that the defendant desired to contest was the amount of the damages. The next thing which happened was the agreement that the money in court should be treated as paid in on behalf of the present defendant only, and that the time for acceptance should run from the date of the agreement, but the plaintiff did not accept the sum within the 7 days prescribed by R.S.C., Ord. 22, r. 2 (1). In paying in as much as £1,062, the defendant was obviously influenced by the fact that, at the time, the courts had been awarding very substantial sums for loss of expectation of life. While the amounts often differed very widely, it was by no means unknown for sums exceeding £1,000 to be awarded, even in cases where the person affected was an infant of tender years, and in Apr., 1940, or June, 1940, a defendant was justified in thinking that, in a case like the present, his liability might well be assessed at not less than £1,000, while the plaintiff, on the other hand, might well think that there was a reasonable chance that, in the case of his daughter aged 22 years with a promising career before her, who had, in addition, a claim for three days pain and suffering, the award would be greater than £1,052. However, in Dec., 1940, the House of Lords gave their decision in *Benham* v. *Gambling* (1). Without attempting to lay down any hard-and-fast standard for measuring damages in these cases, their Lordships clearly disapproved the generous scale which had hitherto almost universally prevailed, and it was at once obvious that damages for loss of expectation of life would have to be scaled down very considerably. It is true that, in the particular case the House was considering, the loss of life was that of a child of tender years, but the opinion of VISCOUNT SIMON, L.C., clearly applies to all cases which may be brought for loss of expectation of life, and since that decision it is clear that, while there is still room for considerable divergence in the amounts to be awarded, a sum approximating to anything like £1,000 must be the exception, and not the rule. This decision not unnaturally caused a change of heart in both parties. The plaintiff apparently thought he had better take what had been paid in, if he could, rather than risk a trial in the changed atmosphere, while the defendant also repented of having paid in so much. Accordingly, the defendant took out a summons asking that the money in court should be repaid to him, as the plaintiff had failed to accept it, and the following day the plaintiff applied for leave to accept the amount paid in. While many considerations apply equally, in the particular circumstances of this case, to both summonses, it is desirable to deal with them separately, and we will first consider that of the plaintiff. Payment into court is, and always has been, a matter depending entirely on statute, or rules of court, which have the force of statutes. The statutory provisions and the rules have both been altered from time to time, and, while it might be interesting to trace their history and the various alterations which have been made, the question we have to determine depends solely on R.S.C., Ord. 22, which has existed in its present form since 1933, with one amendment in 1934, and decisions on statutes and rules which formerly obtained are of no material assistance. Rule 1 provides for payment into court in satisfaction of one or more causes of action, and provides that notice of the payment shall be given to the plaintiff. The notice is to be in a prescribed form, and is to state whether liability is admitted or denied. Payment into court is not, and never was, a defence. Under the rules existing before 1933, payment, if made with denial of liability, could not be made before defence, and had to be mentioned in the pleading, but now no mention of the fact is to be made in the defence, except in certain cases of libel or where a tender is pleaded. By r. 2 (1), the plaintiff may within 7 days accept the money in satisfaction by giving a prescribed notice, and thereupon he is entitled to receive payment A of the accepted sum in satisfaction, and by r. 2 (2) proceedings are then stayed. It is worthy of notice that this applies alike to payments with admission of liability and to those with denial, and that it is no longer possible for a plaintiff to take out money paid in with admission of liability and continue the action in the hope of getting more. By r. 2 (3), if the B plaintiff accepts the money—which must mean if he accepts it within the 7 days—he may thereupon tax his costs, unless the court or a judge otherwise orders. This gives the court complete control over costs even where the money is accepted within the prescribed time, though it probably would be exceptional for the court to refuse the plaintiff C his costs in these circumstances. The action is then at an end. If the plaintiff does not accept the money within 7 days, r. 3 applies, and that rule provides that the money remaining in court shall not be paid out except in satisfaction and in pursuance of an order of the court or a judge, which may be made at any time before, at or after the trial. D Counsel for the respondent contended before us that, so long as the money was in court, the plaintiff had an absolute right at any time to obtain an order for payment out to him. He contended that the notice under r. 1 (3) was an offer which the plaintiff could accept at any time up to the eve of trial, and that the obtaining of an order from the court E was mere machinery for pay office purposes. He supported this argument by citing the statement in THE ANNUAL PRACTICE, p. 407 :

> Now, however, the plaintiff may delay taking the money out of court until the eve of trial.

The answer to his contention is that there is nothing contractual about F payment into court. It is wholly a procedural matter, and has no true analogy to a settlement arranged between the parties out of court, which, of course, does constitute a contract. Once the 7 days have expired, the plaintiff cannot get the money unless he can obtain an order, and before the court makes an order, it must consider whether G or not it is right to do so. Counsel for the respondent admitted that, if the defendant could show that he had grounds for alleging fraud or mistake which was unknown to him when he paid the money in, the court would refuse to allow the money to be paid out, but he contended that these were the only grounds on which an order could be refused. H We can see no ground for putting such a limit on the powers of the court. If the court can in any circumstances refuse an order, it is plain that, in making or refusing an order, the court must be acting judicially, and not ministerially. If the plaintiff can accept as of right up to the eve of trial, why may he not do so during the trial ? The note in THE ANNUAL PRACTICE to which counsel for the respondent referred clearly has reference to the concluding words of r. 3, which says that an order may be made at any time before, at or after the trial. In other words, the plaintiff may ask for an order at any time, but it does not mean that he is necessarily entitled to it. In substance, the same argument was advanced by the plaintiff in *Frazer & Haws, Ltd.* v. *Burns* (2), and was briefly answered by LORD HANWORTH, M.R., who inquired: "What is the good of the 7 days ?" It is clear, in our opinion, that, if the plaintiff does not accept the money within the prescribed time, the court has thereafter complete discretion either to make or to refuse an order. In the majority of cases, no doubt, it would only be a question of costs whether the plaintiff should pay those incurred between the expiration of the 7 days and the date of the application, but there may be many other considerations. In *Frazer & Haws, Ltd.* v. *Burns* (2), money had been paid in with denial of liability, and the defendants subsequently discovered grounds which they thought gave them a complete defence. They were allowed, on the terms of leaving the money in court, to amend their defence by withdrawing the offer they had made, which meant that the plaintiffs could not take the money out before trial. In *Williams* v. *Boag* (3), money had been paid in with an admission of liability, but had not been accepted. On discovering facts which it was admitted formed a complete defence to the action, the defendants were allowed to amend, and, although the money had been paid in with admission of liability, this court ordered it to be returned to the defendant.

It being thus shown that the court has complete power to grant or to refuse an order after the 7 days have expired, ought an order to have been made in this case ? We have already referred to the change which took place after the money was paid in by reason of the decision of the House of Lords in *Benham* v. *Gambling* (1). The result of that decision is to make it most unlikely that the plaintiff will recover so large a sum as £1,052 in respect of his daughter's death. While making full allowance for the fact that the plaintiff is entitled to recover something in respect of his daughter's suffering for 3 days, I think it is difficult to justify so large an award, far the greater part of which must be for loss of expectation of life, in face of the decision in *Benham* v. *Gambling* (1), and this seems to us to be a good ground for refusing the application and leaving the parties to proceed to trial to have the proper amount assessed. It is not clear to us on what grounds exactly ATKINSON, J., made the order he did, but, considering that he gave the plaintiff the costs, we think that he may have considered that the plaintiff was entitled to an order as of right. With that we disagree, and, accordingly, we allow the appeal from that order.

We must now consider the defendant's application to amend the notice of payment in by reducing the amount to £350. When the application to withdraw the payment in came before the master, counsel for the defendant did not persist in asking that all the money should be paid out, but obtained leave to amend his notice so that it read as follows :

> Take notice that the defendant, C. Pothecary, has paid into court £1,062 12*s.* 6*d.*, and says that £10, part of that sum, is enough to satisfy the plaintiff's personal claim and that £350, a further part of that sum, is enough to satisfy the plaintiff's claim under the Law Reform (Miscellaneous Provisions) Act, and admits negligence but denies the damage.

The result of that amendment was that £702 12*s.* 6*d.* had been paid into court with neither an admission nor a denial of liability. It was not ordered to remain as security for any judgment the plaintiff might obtain. It was simply in the air. Such a notice is also open to the further objection that it states that the damage—that is, the whole damage—is denied, whereas, as pointed out earlier in this judgment, the defence admits damage. No such amendment ought to have been allowed, and we agree with the judge who reversed that order of the master. We think it right to say what we conceive to be the proper procedure to adopt when a defendant desires to obtain leave to withdraw or reduce his payment into court. In our opinion, if he wishes to withdraw the whole payment, he should ask for an order that he be at liberty to withdraw his notice of payment in and that the sum in court should be paid out to him, or be otherwise dealt with as the court may direct. Then, if the court grants the application, it will consider whether the money should still remain in court as a security, as in *Frazer & Haws, Ltd.* v. *Burns* (2), or whether it should be returned to the defendant, as in *Williams* v. *Boag* (3). If he wishes to reduce the payment, he should apply for an order that he be at liberty to withdraw the notice already served and to substitute therefor a notice containing the reduced amount, and for an order that the difference between the two sums be repaid to him or be otherwise dealt with as the court may direct. However, we do not propose making this order now. The defendant sought an order which resulted in his serving a bad notice, and the judge was right in allowing the appeal and setting aside the master's order. If the defendant now wants to amend his notice, he had better first take steps to amend his defence and start again, and we express no opinion as to whether or not, if the application is made, it should be granted. Indeed, we think it is desirable to say that it must not be thought that a defendant who has paid a sum into court is entitled as of right to resile from that step. He must, in our opinion, show that there are good reasons for his application—for instance, the discovery of further evidence which puts a wholly different complexion on the case, as in *Frazer & Haws, Ltd.* v. *Burns* (2) and *Williams* v. *Boag* (3), or a change in the legal outlook brought about by a new judicial decision, as in the present case, and there may be others. Having once put a valuation on the plaintiff's case, the defendant ought not to be allowed to alter it without good reason. We think the same considerations apply if the matter comes before the court on an application by the plaintiff to have the money paid out to him. The court is not to consider merely whether the amount paid in is large or small, nor is it called on to take into account the sort of circumstances which would be proper if, for instance, it were asked to approve a settlement on behalf of an infant, apart from matters such as fraud or mistake affecting the original payment. It should consider whether there is a sufficient change of circumstance since the money was paid in to make it just that the the defendant should have an opportunity of withdrawing or reducing his payment.

With regard to costs, as each party has succeeded on one appeal and lost on the other, we think that there should be no costs to either side in this court. In the appeal relating to the application for payment out of court to the plaintiff, the order will be: Appeal allowed. Order of the judge in chambers discharged and that of the master restored. The costs before the master and the judge to be the defendant's in any event. No costs of the appeal to this court. In the appeal relating to the amendment, the order will be: Appeal dismissed without costs, but the costs of the application to the master and of the appeal to the judge to be the plaintiff's in any event.

Solicitors: *L. Bingham & Co.* (for the appellant); *Crossman, Block & Co.*, agents for *Sharman & Trethewy*, Bedford (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WHIGHAM *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (LAWRENCE, J.), **April 29, May 9, 1941.**]

Income Tax—Disposition in favour of children—Trusts to determine if child ceased to be British subject—Whether disposition "for some period less than the life of the child"—Finance Act, 1922 (*c.* 17), *s.* 20 (1) (*c*). A

Clause 6 of a settlement in favour of the settlor's children, who were then minors, provided, *inter alia*, that, if " any child of the settlor shall before becoming absolutely entitled in possession to a share of the trust fund cease to be a British subject or attempt to alien charge or anticipate the same or any part thereof," the trusts declared in his favour should forthwith cease and determine. The Crown contended that this provision rendered the whole income of the settled fund liable to be B treated for purposes of income tax as the income of the settlor by virtue of the Finance Act, 1922, s. 20 (1) (*c*), on the ground that cl. 6 made that income payable to the children for some period less than their lives, and that the second proviso to subsect. (1) (*c*) did not protect the disposition :—

HELD : a distinction must be drawn between a settlement until a C certain event and a settlement which may be defeated in a certain event. Having regard to the terms used in cl. 6, the settlement in this case came in the second category, and, accordingly, it was not a disposition for some period less than the lives of the children within the meaning of sect. 20 (1) (*c*).

[**EDITORIAL NOTE.** In this case, LAWRENCE, J., has followed *Wiggins* v. *Watson's Trustees* (2) rather than *Levitt* v. *Inland Revenue* (1). It should be noted D that, when the Court of Session decided *Levitt* v. *Inland Revenue* (1), the appeal to the House of Lords in *Wiggins* v. *Watson's Trustees* (2) had not been heard. So far as the present case is concerned, it was admitted that *Levitt* v. *Inland Revenue* (1) was distinguishable on the facts, since in that case the terms of the settlement were such that the settlor might secure the benefit of the settled property for himself in certain events, whereas in the case here under consideration in no circumstances E would the property revert to the settlor. While LAWRENCE, J., has refrained from expressing an opinion as to whether sect. 20 (1) (*c*) contemplated only those cases in which the settlor had provided for the reversion of the trust property to himself, he has drawn a clear distinction between a limitation which in terms gives the income to a child of the settlor until a certain event and one which in terms gives it to the child for life but is liable to be defeated on the happening of a certain event. F

AS TO DISPOSITIONS IN FAVOUR OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 17, pp. 268-270, para. 538 ; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575a, 575b, 575b i.]

Cases referred to :

(1) *Levitt* v. *Inland Revenue*, [1932] S.C. 629 ; Digest Supp. ; 17 Tax Cas. 719.

(2) *Wiggins* v. *Watson's Trustees*, [1934] A.C. 264 ; Digest Supp. ; 102 L.J.K.B. 464 ; 148 L.T. 482 ; 17 Tax Cas. 728. G

APPEAL by way of case stated under the Income Tax Act, 1918, for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

J. S. Scrimgeour for the appellant. H

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

LAWRENCE, J. : The appellant settled sums of money upon trust for his children, who were then minors. Clause 6 of the settlement provided as follows :

> If any child of the settlor shall before becoming absolutely entitled in posesssion to a share of the trust fund cease to be a British subject or attempt to alien charge or anticipate the same or any part thereof or do or attempt to do or suffer any other act or thing or if any event should happen whereby if such share were payable to him or her absolutely he or she would be deprived of the right to receive the same or any part thereof the trusts hereinbefore declared in his or her favour shall forthwith absolutely cease and determine and he or she shall be deemed for all the purposes of these presents to have died under the age of 21 but without prejudice to any payment of income or capital which the trustee may previously have made to or for him or her in respect of such share.

This provision, according to the Crown, attracts tax to the whole income of the settled fund. It is said that the settlement infringes the Finance Act, 1922, s. 20 (1) (*c*), in that, by virtue of the disposition, income is payable to the children for some period less than their lives, and is not protected by the second proviso, and that, in any event, the decision of the Court of Session in *Levitt* v. *Inland Revenue* (1) is in point and must be followed. It is conceded by the Crown that *Levitt's* case (1) is distinguishable on the facts, since the settlor there reserved to himself a power of appointment if the child on whom the property was settled should marry someone not of the Jewish race or faith, whereas in the present case the property will not in any event revert to the settlor, but it is said that that distinction was not referred to by the judges of the Court of Session, and is in law irrelevant.

The appellant in the first place contends that all the subsections of sect. 20 impliedly contemplate that the income deemed to be the income of the settlor shall be capable of ultimate enjoyment by the settlor or his wife. The appellant also relies upon *Wiggins* v. *Watson's Trustees* (2), where it was held that a settlement upon a child for life containing a power of revocation with the consent of one of five persons was not a settlement for a period less than the life of the child, but the distinction was insisted upon between a settlement until a certain event and a settlement which may be defeated in a certain event. The Attorney-General's explanation of this case was that the settlement was not held to be for a period less than the life of the child, because the power of revocation was a power to revoke the whole deed, and, though contained in the deed, was not contained in the limitation itself.

In my opinion, this explanation does not cover the whole decision. ROWLATT, J., said, at p. 250 :

> I think, however, that there is another ground on which that argument can be displaced. I do not think the exemptions referred to deal with circumstances quite in the same plane as the circumstances with which we have to deal. The exemptions deal with events working a defeasance within the limits of the limitation itself. The limitation stands unless bankruptcy or assignment or the death of the father or something equivalent intervenes which may shorten the limitation as it stands.

In the same case, ROMER, L.J., said, at p. 258 :

> It was said by Mr. Stamp that we ought to read this settlement as though the direction were to pay the income to the child during his life, or until the power of revocation is exercised. If the trust had been expressed in those terms, I think I should agree that the child was not entitled by virtue or in consequence of the instrument to the income during his life.

These observations appear to me to be in the appellant's favour. What the judges were saying was that, apart from the settlor's right to revoke, the fact that the disposition of the settlement itself was not until the bankruptcy of the beneficiary, but was to be defeated in the event of the bankruptcy of the beneficiary, prevented the application of the section. Thus, in the present case, in my opinion, the disposition of the settlement was for the lives of all the children, and not until they ceased to be British A subjects, and cl. 6 merely provides for defeasance if any child should cease to be a British subject before becoming absolutely entitled. It is to be observed that, when the Court of Session decided *Levitt* v. *Inland Revenue* (1), *Wiggins* v. *Watson's Trustees* (2) had been decided by Rowlatt, J., alone, and the only member of the Court of Session who B noticed it thought that the argument had not been fully presented to Rowlatt, J. Any judge who has had the advantage of listening to Mr. Stamp must find that difficult to accept. For these reasons, I hold that I ought to follow *Wiggins* v. *Watson's Trustees* (2) rather than *Levitt* v. *Inland Revenue* (1). I express no opinion on the argument that C the section contemplates only those cases in which the disposition provides that the income shall revert to the settlor. The appeal will be allowed with costs.

Appeal allowed with costs.

D

Solicitors : *Linklaters & Paines* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

Applied. PEARSON *v.* COLEMAN BROS. [1948] 2 All E.R. 274.

GOULD *v.* McAULIFFE.

[COURT OF APPEAL (Scott and Goddard, L.JJ., and Stable, J.), **May 2, 1941.**]

Animals—Injuries by animals—Dog known to be dangerous—Customer of public-house acting reasonably—Invitee—Duty of person keeping dangerous animal.

The plaintiff went to a public-house to meet her husband, and, while waiting for him, she had occasion to look for a lavatory. She did not inquire where she could find one, but went to a garden at the side of the public-house. Some years before, there had been a lavatory there, and the plaintiff had used it, but it had since been removed. Not finding this lavatory, the plaintiff passed to the other side of the garden and through a gate which was open at the time. She had proceeded only a step or two beyond the gate when she was attacked and injured by a dog belonging to the licensee of the premises, the defendant. In the court below, it was found (i) that there was an invitation to the plaintiff to enter the garden but not to pass beyond it through the gate, (ii) that the plaintiff intended to be a customer of the public-house, and (iii) that the dog was one which the defendant knew had previously attacked at least two persons. The plaintiff based her claim on the negligent keeping of the dog, and the defendant contended that, in the place where she was attacked, the plaintiff was a trespasser, and also that her negligence had contributed to her accident :—

HELD : the defendant was an invitee, not only when she went into the garden, but also when she went through the gate into the yard where she was bitten.

Decision of SINGLETON, J. ([1941] 1 All E.R. 515) *affirmed.*

[**EDITORIAL NOTE.** In the court below, it was held that, although the invitation to the plaintiff did not extend beyond the garden to the yard, nevertheless, in passing through the gate into the yard, the plaintiff was acting reasonably. On appeal, it is held that the plaintiff was an invitee, not only when she was in the garden, but also when she went through the gate into the yard. Both courts have based their decisions on the duty of a person keeping a dangerous animal. It was at one time suggested that the keeping of a dangerous animal was unlawful in itself, but later authorities have made it clear that, while it is not unlawful to keep such an animal, to allow it an opportunity to harm anyone is unlawful. Such animals are kept at the peril of the owner, and, if they do harm, the owner will be responsible. This, however, is always subject to the exception that, if the injured person brings his injury on himself, the owner will escape that responsibility.

AS TO LIABILITY FOR INJURIES BY DANGEROUS ANIMALS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 543, 544, paras. 933, 934 ; and FOR CASES, see DIGEST, Vol. 2, pp. 238-241, Nos. 245-262.]

Cases referred to :

(1) *Lowery* v. *Walker*, [1911] A.C. 10 ; 2 Digest 241, *261* ; 80 L.J.K.B. 138 ; 103 L.T. 674.

(2) *Walker* v. *Midland Ry. Co.* (1886), 55 L.T. 489 ; 29 Digest 9, *118*.

(3) *Campbell* v. *Shelbourne Hotel, Ltd.*, [1939] 2 K.B. 534 ; [1939] 2 All E.R. 351 ; Digest Supp. ; 108 L.J.K.B. 607 ; 160 L.T. 436.

(4) *Deane* v. *Clayton* (1817), 7 Taunt. 489 ; 2 Digest 215, *113*.

APPEAL by the defendant from a judgment of SINGLETON, J., dated Feb. 27, 1941, and reported [1941] 1 All E.R. 515, where the facts are fully set out. SINGLETON, J., awarded the plaintiff £150 damages for personal injuries sustained when she was bitten by the defendant's dog.

Linton Thorp, K.C., and *Alban Gordon* for the appellant.

J. Davidson for the respondent.

Thorp, K.C.: The respondent was a trespasser when she opened the gate and passed from the garden to the yard in which the dog was confined. The defendant was not obliged to abstain from having a dangerous dog on a private part of his premises. There was nothing to indicate that the gate through which the plaintiff passed led to a lavatory. [Counsel referred to *Walker* v. *Midland Ry. Co.* (2), *Campbell* v. *Shelbourne Hotel, Ltd.* (3), *Deane* v. *Clayton* (4) and *Lowery* v. *Walker* (1).]

SCOTT, L.J. [after stating the facts]: In the court below, it was contended that the plaintiff became a trespasser when she passed through the gate because the licensee of the house did not intend the public to use the yard. The gate was not locked, nor was there any notice on it that the yard was private, or that trespassers were forbidden, or that there was a dangerous dog there. SINGLETON, J., held that the plaintiff was acting quite reasonably. In my view, the facts constitute an invitation by the defendant to persons on his premises. The plaintiff was, therefore, an invitee, not only to enter the garden, but also to use the gate leading, as she mistakenly thought, to a lavatory. In the view of the court, that disposes of the whole case. The only possible view is that by implication the plaintiff was invited to do what, in fact, she did do, and the defendant was, therefore, under an absolute duty to keep her safe from an animal which he knew to be savage. It is a pure question of fact, and there is no need to refer to authorities, except to mention the words of the EARL OF HALSBURY in *Lowery* v. *Walker* (1), at pp. 12, 13. In my view, that is conclusive on the law. The judge below was right in his decision and the appeal must be dismissed with costs.

GODDARD, L.J.: It has been said that this is a borderline case, but, in my view, it is a very clear one. There was nothing to show that an invitee to this garden ought not to go through the gate in question.

STABLE, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Oswald Hanson & Smith* (for the appellant); *A. A. Terry & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re FIRST MORTGAGE CO-OPERATIVE INVESTMENT TRUST, LTD.

[CHANCERY DIVISION (Bennett, J.), **March 17, 18, 1941.**]

Industrial and Provident Societies—Winding up—Society carrying on speculative dealings in shares—Undertaking to register under Companies Act, 1929*—Prevention of Fraud (Investments) Act,* 1939 (*c.* 16), *s.* 10.

A society was registered in 1928 as a provident and industrial society. It was in fact not a *bona fide* co-operative society, but carried on the business of an investment company, and its capital, being subscriptions amounting to £561,800 provided by 6,850 members, was invested in hazardous and speculative investments. A petition was presented for the winding up of the society. The directors undertook to register the company under the Companies Act, 1929, and thus come under the provisions of that Act prohibiting the publishing of circulars and inviting subscriptions for shares. A majority of the shareholders had expressed the desire that the society should continue :—

HELD : although this was a society which would be compulsorily wound up under the Prevention of Fraud (Investments) Act, 1939, s. 10 (5), having regard to the undertaking to register the society as a company under the Companies Act, 1929, a compulsory windingup order ought not to be made.

[**EDITORIAL NOTE.** The Act of 1939, which is often described as an Act for the prevention of " share pushing," and which was enacted for the purpose of safeguarding small investors from inducements to purchase worthless shares or stock, gives the court power compulsorily to wind up a society carrying on such a business as the society in this case was shown to be engaged in. There was power under sect. 10 (5) of the Act to wind up the society compulsorily, but, as a great majority of the shareholders wished it to continue despite the risk to their savings, the court accepted an undertaking to register the company under the Companies Act, 1929.

FOR THE PREVENTION OF FRAUD (INVESTMENTS) ACT, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 119.]

PETITION presented under the Prevention of Fraud (Investments) Act, 1939, s. 10 (5), by the Chief Registrar and the Assistant Registrar of Friendly Societies for the winding up of the respondents. The facts are fully set out in the judgment.

H. O. Danckwerts for the petitioners.

H. B. Vaisey, K.C., and *E. J. Heckscher* for the respondents.

BENNETT, J. : This windingup petition is presented by the Chief Registrar of Friendly Societies and the Assistant Registrar of Friendly Societies for England for the purpose of winding up a society known as the First Mortgage Co-operative Investment Trust, Ltd., registered on Oct. 17, 1928, under the provisions of the Industrial and Provident Societies Act, 1893. The petition is presented in accordance with the duty which is thrown upon the petitioners by the Prevention of Fraud (Investments) Act, 1939, s. 10 (5). That Act was passed for the purpose of putting an end to what was commonly known as " share pushing," a process by which a great many innocent and credulous people were induced to part with valuable securities and invest the proceeds of sale in worthless stock, as a result of specious representations made to them, very often by a vendor of shares, who usually attended at their back door, but sometimes at the front door. Sect. 10 (5) provides as follows :

> If, with respect to any industrial and provident society registered under the Industrial and Provident Societies Act, 1893, before July 26, 1938, it appears to the registrar (*a*) that neither of the conditions specified in paras. (*a*) and (*b*) of subsect. (1) of this section is fulfilled in the case of that society, and (*b*) that it would be in the interests of persons who have invested or deposited money with the society or any other person that the society should be wound up, the registrar may present to the court a petition for the winding up of the society.

Sect. 10 (1), which defines the conditions referred to by subsect (5,) provides as follows :

> A society shall not be registered under the Industrial and Provident Societies Act, 1893, unless it is shown to the satisfaction of the registrar (*a*) that the society is a *bona fide* co-operative society, or (*b*) that, in view of the fact that the business of the society is being, or is intended to be, conducted (i) mainly for the purpose of improving the conditions of living, or otherwise promoting the social well-being, of members of the working classes, or (ii) otherwise for the benefit of the community, there are special reasons why the society should be registered under the said Act rather than as a company under the Companies Act, 1929.

It is common ground, and is not disputed, that the First Mortgage Co-operative Investment Trust, Ltd., is not a *bona fide* co-operative society. It is also admitted that the business of the society is not, nor is it intended to be conducted

> . . . mainly for the purpose of improving the conditions of living, or otherwise promoting the social well-being, of members of the working classes, or (ii) otherwise for the benefit of the community . . .

Thus the society, having been registered in Oct., 1928, is one to which the provisions of sect. 10 (5) apply, and the registrar may present to the court a petition for the winding up of the society.

There is nothing in the Act to guide the court as to the grounds upon which it is either to make or refuse to make a winding up order, but I apprehend that in coming to a conclusion the court must have regard, as subsect. (5) says that the registrar must have regard, to

> . . . the interests of persons who have invested or deposited money with the society or any other person . . .

This society has 6,850 shareholders. The rules of the society provide that no shareholder shall have a greater interest in the capital of the company than £200, so it is plain that a large number of small investors have been induced to invest money in this society. The total capital raised by the society amounts to £561,800. Counsel for the respondents represents 2,905 shareholders, holding shares of a capital value of £282,800, who say that they do not want the society to be wound up. In response to a circular which the society issued, 17 shareholders gave notice of their wish to support the making of a winding up order. The capital held by those 17 supporting shareholders amounts to £2,252.

The first ground on which the petition is presented by the registrar is that for a number of years the society has issued postcards telling persons into whose hands they came that the security which investment in the society's shares affords is absolute, and that they will get, in the case of yearly investors, 7 per cent. free of income tax upon their money, and, in a later circular, in the case of later advertisements 6 per cent. interest on their money free of income tax. In those circulars are representations that the funds of the society

> . . . are invested in first mortgages on freehold properties, or in bonds and debentures based upon such securities.

The representations are, in effect, that the investor will get a gilt-edged security. Those representations are proved to have been made for a period beginning in 1929 and continuing down to 1937, the date of the latest circular signed by the present secretary, Dann. I will read the statement which Dann makes in his last circular

> You have already received full details of the trust, and have no doubt appreciated that its investments are in freehold property, freehold mortgages and other similar securities, this being the basis of our claim for complete security.

The petitioners' case is that those representations are at any rate misleading. It is quite apparent from the affidavit in support of the petition that the securities in which they have invested their money, or most of those securities, are hazardous and speculative. They have investments, according to the balance sheet to the end of 1939, which are valued at cost at £568,959. With respect to those, the affidavit says :

> With regard to investments of the value at cost of £362, 560, the capital so invested is in jeopardy both as to capital and interest.

The statements in the affidavit, which refer in detail to investments, I think substantiate that assertion. Then it is stated (and this is also the fact) that, in the circulars which they issued, persons who were asked to subscribe were told that they would have the right to the return of their investment at any time, and in point of fact persons who subscribed to the extent of £200,000 have had the amount of their subscriptions repaid. It is now said, however, that that was because the directors did not understand their rules. The facts are admitted. It is admitted that it is *ultra vires*, and they have promised not to do it again.

Another ground upon which it is suggested that this society should be brought to an end is this. It is controlled by men who are interested in other societies and companies, and those men, disregarding the interests of the society, and having regard to their own interests, or to the interests of other companies of which they are directors, or with which they have been associated, have advanced the funds of the society to those companies upon speculative and hazardous investments. There is no denial of the fact that the directors of this trust have advanced the moneys of this trust to other societies in which they are interested, and the evidence satisfies me that in a great many cases the securities upon which the money has been advanced are speculative and hazardous. It is not disputed that, if, at the moment, a great many of the investments were realised, they would produce a great deal less than the amount of money advanced by the directors upon them.

Those are broadly the grounds upon which the petition is put forward. It is said that it would be in the interests of everybody that a society which is carried on as this society has been carried on, and is likely to be carried on, should be wound up. It is one of the bodies to which the Prevention of Fraud (Investments) Act, 1939, was designed to put an end. Counsel for the respondents, conceding to a large extent, I think, that there may have been some errors in the way in which the business has been carried on for some time past, says that he now wants to register, as he can do, under the provisions of the Companies Act, 1929. If he registers under the provisions of that Act, the directors of the company will be subject to the provisions of the 1929 Act and will come under the prohibition which that Act contains against publishing circulars and inviting persons to subscribe for shares. The only effect of making a winding up order would be that those who have ventured their money in the shares of this society will inevitably lose it.

I ought, perhaps, to say that until comparatively recently this trust has paid interest at the rate of 7 per cent. and at the rate of 6 per cent. The ways in which it has paid it are questioned in the affidavit in support of the petition, but, as I said at the outset, it seems to me that I must have regard to the interests of persons who have invested or deposited money in the society. There are a great many of them, and they have deposited over £500,000. If a winding up order is made (and this counsel for the petitioner concedes), they will get back very little, if anything, of their money. I suppose that, if the society continues as a company registered under the Companies Act, 1929, there is a chance, if times improve, of getting something back. Things can be better, but they cannot be worse. For this reason, although I confess that I should like to see this society out of the way and wound up, having regard to the language of sect. 10 (5) and to the fact that the society must now apply to register under the Companies Act, 1929, or be wound up under the provisions of this Act, I do not feel inclined to make an order for the compulsory winding up of this trust.

The only thing which remains is costs. I agree that the registrar was abundantly justified in bringing the matter before the court. It is obviously a case which needed inquiry and investigation, but I think that the petition must be dismissed with the usual consequences.

Petition dismissed with costs.

Solicitors: *Treasury Solicitor* (for the petitioners); *Leach, Sims & Co.* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re DE LA BERE MARRIAGE SETTLEMENT TRUSTS, DE LA BERE *v.* PUBLIC TRUSTEE.

[CHANCERY DIVISION (Simonds, J.), **May 28, 1941.**]

Settlements—Covenants to settle after-acquired property—Exclusion of property where intention expressed — Appointment of property — Power of appointor to express intention to exclude property.

A marriage settlement, dated Apr. 29, 1919, contained a covenant that any property acquired by the wife, M.B., after that date should become subject to the same trusts as the settlement, with the exception, *inter alia*, of " any property as to which in the instrument under which it is acquired . . . an intention is expressed that it shall be exempt from this present covenant." By a settlement, dated May 3, 1938, the trustees thereof were given a power of appointment " to divide the trust fund or any part thereof in such shares between . . . such one or more of the said M.B., J.B. and B.N. and . . . their issue respectively as the trustees shall in their absolute discretion determine." J.B. and B.N. were the sisters of M.B. and had similar marriage settlements. In exercise of the power of appointment, the trustees executed a deed poll of appointment on Feb. 7, 1941, by which they appointed the trust fund to the beneficiaries in equal shares, exempt from the covenant in the marriage settlement to settle after-acquired property. The trustees of the marriage settlement contended (i) that the property was not exempt from the operation of the covenant, as the instrument under which the interest was acquired was not the deed poll but the settlement of 1938, in which no intention to exclude the covenant was expressed, and (ii) that the exercise of the power was excessive, as the instrument creating it did not authorise the exclusion of the covenant to be expressed in the exercise of the power :—

HELD : (i) the appointment was the instrument under which the interest arose, and the covenant in the marriage settlement was, therefore, excluded.

(ii) a power to appoint an absolute interest must include a power to appoint a limited or restricted interest, and, accordingly, the appointment was not excessive.

[**EDITORIAL NOTE.** It must be noted that the after-acquired property clause in the settlement excepted property which, in the instrument under which it should be acquired, was stated not to be subject to that clause. The main question is whether a person who has a power to appoint to a class including the beneficiary under the settlement can include a clause exempting it from the operation of the after-acquired provision in the settlement. This is decided as a matter of construction of the power. The power in this case was such that, upon its proper construction, the appointed property was to become the absolute property of the members of the class, and for this reason it is decided that the appointor has the power to exclude the appointed property from the operation of the after-acquired property clause.

AS TO PROPERTY EXCEPTED FROM AFTER-ACQUIRED PROPERTY CLAUSE, see HALSBURY, Hailsham Edn., Vol. 29, p. 579, para. 843 ; and FOR CASES, see DIGEST, Vol. 40, pp. 519, 520, Nos. 641-651.]

Cases referred to :

(1) *Re Dickinson's Settlements, Bickersteth* v. *Dickinson*, [1939] Ch. 27 ; Digest Supp. ; 108 L.J. Ch. 40 ; 159 L.T. 614.

(2) *Public Trustee* v. *Wolf*, [1923] A.C. 544 ; Digest Supp. ; 92 L.J. Ch. 520 ; 129 L.T. 738 ; *revsg.* S.C. *sub nom. Re Rush, Warre* v. *Rush*, [1923] 1 Ch. 56.

(3) *Northumberland (Duke)* v. *Inland Revenue Comrs.*, [1911] 2 K.B. 1011 ; 39 Digest 296, *762* ; 81 L.J.K.B. 240 ; 105 L.T. 485.

Summons to determine whether a power of appointment exercised by a deed poll, dated Feb. 7, 1941, was validly exercised. The facts are fully set out in the judgment.

Wilfrid M. Hunt for the plaintiffs.

Hubert A. Rose for the defendants.

Simonds, J.: On Apr. 29, 1919, a marriage settlement was made for the marriage of Rupert de la Bere and Marguerite Humphery, daughter of Sir John Humphery. That settlement contained a clause in the following terms:

> If the wife shall at any time hereafter during the joint lives of the husband and the wife or if the husband in her right shall at any time or times during the said coverture become by any means entitled to any property or any estate or interest except property not exceeding £500 in value vesting in possession during the said intended coverture at the same time and from a single source and except any property as to which in the instrument under which it is acquired by the wife or in a writing signed by the donor of such property either before or within 6 calendar months after making the gift thereof an intention is expressed that it shall be exempt from this present covenant or from any provision of a like nature and except moveable chattels all of which hereinbefore excepted property shall remain the wife's absolute property and separate estate . . . the said property (except as aforesaid) shall at the expense of such property or the trust fund be transferred by the wife her heirs executors or administrators and all other necessary parties if any to the trustee who shall either retain the same or any part thereof in its then condition or shall sell call in and convert into money such part of the said property as shall not consist of money and invest the proceeds thereof and any money in manner hereby authorised and the trustee shall hold the same and the proceeds thereof and the investments for the time being representing the same as part of and upon the same trusts as the trust fund.

On May 3, 1938, a settlement was made between one John Daniel Oppe, therein described as the settlor, and certain persons as trustees, by which the settlor declared that the trustees were to hold the trust fund therein described upon trust for accumulation. Clause 4 provided as follows:

> Subject to the trusts aforesaid, the trustees shall hold the trust fund and the income thereof upon trust to pay or apply the income therefrom to or for the benefit of such one or more of the following viz. Marguerite de la Bere Joan Burnett and Betty Nicory the daughters of Sir John Humphery and their issue respectively and in such proportions or amounts as the trustees may from time to time think fit for a period expiring 21 years from the date hereof and on the expiration of such period upon trust to divide the trust fund or any part thereof in such shares between or to pay and transfer the same or any part thereof to such one or more of the said Marguerite de la Bere Joan Burnett and Betty Nicory and for their issue respectively as the trustees shall in their absolute discretion determine and so far as the same shall not extend upon trust for the said Marguerite de la Bere Joan Burnett and Betty Nicory as tenants in common in equal shares.

In exercise of the power of appointment given to them by the settlement, on Feb. 7, 1941, the trustees thereof executed a deed poll of appointment by which they

> . . . do irrevocably appoint direct and determine that the trust fund held by us as such trustees or any future trustee or trustees of the said settlement shall upon the expiry of the term of the trusts of the said settlement go to and be the property of Marguerite de la Bere Joan Burnett and Betty Nicory mentioned in the said settlement in equal shares and we hereby express the intention that the said share of each of them in the trust fund shall be exempt from the covenant to settle after-acquired property contained in the settlement made prior to or after her marriage.

Then the dates of the settlements are given. I have stated the settlement of one daughter only, Marguerite de la Bere, but similar settlements had been executed in the case of the other two daughters.

Two questions arise for determination. The first question is this. The exclusion, in the case of each daughter, of her share of the trust fund from the operation of the after-acquired property clause in her settlement was contained, not in the settlement creating the power, but in the instrument under which the power was exercised. It is urged on behalf of the trustees of the settlement that that latter instrument, the deed poll of appointment, was not an instrument under which the property was acquired by the wife, but, on the contrary, the property was acquired under the settlement creating the power, wherein there was no intention expressed that the after-acquired property clause should be excluded. I think that it is reasonably clear that the instrument under which the daughter acquired her share of the trust fund was the deed poll of appointment under which the power was exercised.

In coming to that conclusion, I am following the close analogy of the recent decision of Crossman, J., in *Re Dickinson's Settlements, Bickersteth* v. *Dickinson* (1). There the judge had to consider the effect of the Trustee Act, 1925, s. 31. That section confers on trustees power to pay or apply income for maintenance and other purposes where property is held by trustees for any person for any interest whatsoever, whether vested or contingent. Sect. 31 (5), however, provides that the section does not apply where the document, if any, under which the interest arises came into operation before the commencement of the Act. The judge had to consider a case where the document creating the power had come into existence before the commencement of the Act, but the document exercising the power had come into existence after the commencement of the Act, and the question was whether the interest with which the trustees were purporting to deal was one which arose under an instrument which came into operation before or after the commencement of the Act. The judge held that the interest arose under the instrument by which the power was exercised—that is to say, an instrument which came into operation after the commencement of the Act—so that the subsection did not exclude it from the exercise by the trustees of the power which they sought to exercise. In coming to that conclusion, he found support in the earlier cases of *Re Rush, Warre* v. *Rush* (2) and *Northumberland (Duke)* v. *Inland Revenue Comrs.* (3). In fact, both those cases are examples of a principle which seems to be perfectly clear—namely, that, where one has an instrument creating a power and an instrument exercising that power, the interest created by the exercise of the power arises under the latter instrument, for in fact there never was such an interest until the power was exercised so as to create it. Accordingly, I come to the conclusion upon the first point here that the instrument under which the daughter acquired her interest was the instrument which contained the expression of opinion that it should be exempt from the covenant for the settlement of her after-acquired property.

The next point is this. It is said : " Let that be so. Nevertheless, the trustees were not authorised by the terms of the instrument creating the power to express, upon any exercise of it, the intention that an interest taken by the daughters should be exempt from their covenant for the settlement of after-acquired property." It is quite true that the settlement creating the power contains no such express provision, but, if I look at the substance of it, I find a power which is unqualified and unlimited in its language, and which is intended to give to the trustees exercising it the power to make the trust fund the property of any one or more of the daughters or their issue. It has been held that, where one has a power of that kind, it is competent for the donee to exercise it in such a way as to qualify the interest which may be given, so that a power to appoint the whole of the fund must include the power to appoint a part of it. The power to appoint an absolute interest must include the power to appoint a limited interest, whether a life interest or a reversionary interest, and includes the power to hedge about the creation of an absolute interest with such restrictions as the donor of the power himself might have imposed. It is, I think, a corollary of that that the donee of such a power as this had also the right to make effective the exercise of the power entrusted to him, and, where necessary, to make it effective by the expression of such an intention as will carry out in its entirety the effective exercise of the power which has been confided to him. It is essential, in my judgment, so to construe a power of this kind as to enable the donee of it to exercise it effectively, and that can be done, where it is necessary for him to do it, only if the donee of the power is competent to give such an expression of his intention as to exclude the operation of a covenant for the settlement of after-acquired property in a settlement made by or for the benefit of an object of the power. Accordingly, I think that in this case I cannot regard the expression by the trustees contained in the instrument by which they exercised their power as being in excess of the power given to them. The result is that the trust fund is appointed to the three daughters of Sir John Humphery, and the share of the trust fund is in each case excluded from the operation of the covenant.

Declaration that property excluded from operation of covenant and power validly exercised.

Solicitors : *Druces & Attlee* (for all parties).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

JOHN BARKER & CO., LTD. *v.* LITTMAN.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), **May 26, 1941.**]

Emergency Legislation—Order for specific performance—Failure of purchaser to obey order—Application by vendors to forfeit deposit—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) (*a*) (*iv*).

The defendant having failed to complete an agreement to purchase certain freehold property, the plaintiffs obtained judgment in an action for specific performance. On the defendant's failure to comply with the judgment, the plaintiffs issued a summons under the Courts (Emergency Powers) Act, 1939, for its enforcement, but they did not think it worth their while to continue those proceedings, and subsequently they brought a motion asking for rescission of the contract and forfeiture of the deposit. On appeal, the defendant admitted that he could not complain against the order for rescission of the contract made in the court below, but contended that he was entitled to have his deposit repaid to him :—

HELD : the plaintiffs were not claiming to exercise a remedy for the payment or recovery of money, but were simply claiming to retain a deposit, which, under the terms of the contract, was their money. They were asking for an order to which, under the relevant authorities, they were entitled *ex debito justitiae.* The case, therefore, did not come within the terms of the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (iv).

Decision of BENNETT, J. ([1941] 2 All E.R. 15) *affirmed.*

[**EDITORIAL NOTE.** In *S. & A. Services, Ltd.* v. *Dickson* (5) it was held that the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*) (ii), barred remedies by way of self-help, unless the leave of the court was first obtained. Here the plaintiffs were not exercising a remedy by way of self-help. They, being the vendors, had obtained judgment for the specific performance of a contract for the sale of land. It was then found that the purchaser was quite unable to complete and there was really no possibility of enforcing the order for specific performance. In these circumstances the vendors, as they were entitled to do, asked the court for an order for rescission of the contract and return of the deposit. This is not a proceeding by way of self-help, and it is affirmed by the Court of Appeal that it is not a proceeding within any provision of the Courts (Emergency Powers) Act, 1939, for which the applicant needs the leave of the court to proceed. It will be remembered that there is another method of forfeiting a deposit. Where delay in completion has occurred, the vendor can issue a notice making time of the essence of the contract and calling for completion by a named date, and, on default, the deposit is forfeited to the vendor. Where the deposit has been paid to the vendor, this no doubt would be a proceeding by way of self-help, though it might be otherwise where the deposit is in the hands of a stakeholder. In so far as such a proceeding is one by way of self-help, the leave of the court to proceed is necessary.

AS TO THE COURTS (EMERGENCY POWERS) ACT, 1939, s. 1 (2), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 947, 948 ; and BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, p. 207.]

Cases referred to :

(1) *Howe* v. *Smith* (1884), 27 Ch.D. 89 ; 40 Digest 226, *1959* ; 53 L.J. Ch. 1055 ; 50 L.T. 573.

(2) *Re Parnell, Ex p. Barrell* (1875), 10 Ch. App. 512 ; 40 Digest 228, *1983* ; 44 L.J.Bcy.138 ; 33 L.T. 115.

(3) *Austins of East Ham, Ltd.* v. *Macey* (1941), 57 T.L.R. 446 ; Digest Supp.

(4) *Broadstairs Picture House, Ltd.* v. *Littman,* [1940] Ch. 860 ; [1940] 3 All E.R. 419 ; Digest Supp.

(5) *S. & A. Services, Ltd.* v. *Dickson,* [1940] 2 K.B. 219 ; [1940] 3 All E.R. 98 ; Digest Supp.

Appeal by the defendant from a judgment of Bennett, J., dated April 4, 1941 and reported [1941] 2 All E.R. 15, where the facts are fully set out.

Lindsay M. Jopling for the appellant.

Charles E. Harman, K.C., and *E. J. Heckscher* for the respondents.

Scott, L.J.: The point in issue is a very simple one. The vendors agreed to sell certain property under special conditions of sale, which contained, *inter alia*, this provision in cl. 20:

> If the purchaser shall neglect or fail to complete his purchase according to these conditions his deposit shall thereupon be forfeited (unless the court otherwise directs) to the vendor . . . and the vendor may, with or without notice or without previously tendering a conveyance, re-sell the property at such time, in such manner and subject to such conditions, as he shall think fit.

The purchase price was £13,000, and a deposit of £650 was duly paid to the auctioneers, who held it as stakeholders. Although a good title had been made out, the purchaser was unable to complete on the date fixed for completion. The vendors obtained judgment for specific performance in the usual form. The purchaser being still unable to complete, the vendors felt satisfied that they were not likely to get the money for their sale and decided to ask the court to rescind the contract. It is on the order which was duly made in common form that this appeal arises.

The purchaser contended that, although, since he was in default, he could not complain against the order for rescission, yet he was entitled to have his deposit repaid to him. That is the simple question which we have to decide. The judge in the court below, in a judgment with which I entirely agree, held that the vendors were entitled, on account of the purchaser's default, to the order for rescission, and he ordered that the deposit should be forfeited to the plaintiffs. Counsel for the appellant took the point, first of all, that he was assisted by the Courts (Emergency Powers) Act, 1939, and argued that the purchaser ought not to have been deprived of his right to the deposit, but it was pointed out to him that the words of the only relevant section for this purpose in the Act did not assist him. Sect. 1 (2) of the Act provides as follows:

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, (*a*) to proceed to exercise any remedy which is available to him by way of (i) the levying of distress, (ii) the taking of possession of any property or the appointment of a receiver of any property . . . (iv) the realisation of any security or the forfeiture of any deposit . . .

The words "shall not be entitled to . . . proceed to exercise any remedy whichis available to him by way of . . . forfeiture of any deposit" are the only words under which the claim advanced by counsel for the appellant could be made. We pointed out to him that the proceeding here was not a proceeding by which the vendors were claiming to exercise in their own right a remedy for the payment or recovery of money, but were claiming to exercise a right to retain the money which, on the terms of the contract, was their money, and counsel conceded, after consideration, that he could not make any different submission on the construction of the Act. However, he said that a court of equity in such a case might well take into account the kind of consideration laid down in the Act. To that argument I am unable to assent. The Act was a very special one depriving plaintiffs of certain rights, particularly procedural rights, and ought not to be extended beyond the fair interpretation of its language, and I cannot myself see that a court of equity could find in it any principles of equity which would alter the present position. I leave to CLAUSON and LUXMOORE, L.JJ., the further consideration of that aspect of the matter.

Apart from that Act, it is a pure question of the interpretation of the contract of sale. The question is one which has been considered by the courts on many occasions, and the principle laid down, as I read the decisions, is that which was enunciated in *Howe* v. *Smith* (1) in 1884. There, on the sale of real estate, the purchaser paid £500, which was stated in the contract to be paid as a deposit and in part-payment of the purchase money. Then the purchaser was not ready, and, after repeated delays, the vendor re-sold the property for the same price, pursuant to a special term in the contract. The original purchaser commenced an action for specific performance, and the Court of Appeal held that the purchaser, by his delay, had lost his right to specific performance, and, further, that although, according to the contract, the deposit was to be taken as part-payment if the contract was completed, it was also a guarantee for the performance of the contract, and that the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. The phrase reported in the headnote about the guarantee is from the judgment of COTTON, L.J., at p. 95:

> What is the deposit? The deposit, as I understand it, and using the words of JAMES, L.J., [in *Re Parnell, Ex p. Barrell* (2)] is a guarantee that the contract shall be performed.

In that case, FRY, L.J., at p. 101, explained the principle on which the contract had to be construed in cases like the one then before the court, in which there was no provision that the deposit should be forfeited in case of default by the purchaser. He said, at p. 101:

> Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that, in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.

That decision was followed in subsequent cases to which I do not think it is necessary to refer. Where the contract does contain provision that the deposit shall be forfeited in the case of the purchaser's default, it appears to me to be an *a fortiori* case that the original bargain is that the deposit shall, in the event of the sale going through, be applied in part-payment of the price, and, in the event of the sale not going through without any default by the vendors but by default of the purchaser, it shall remain in the vendors' pocket as their property. In my view, the same position necessarily results where the money is put into the hands of a stakeholder. A stakeholder holds it on one condition only—namely, that he shall hold it for the person entitled to receive it under the contract according to the terms of the contract. If the vendor made default, then obviously the stakeholder would hold the deposit for the purchaser. Otherwise he holds it for the vendor as his money. That brings in the common law principle that no action by the purchaser against the vendor in such circumstances as these would lie for money had and received, because, as the principle is expressed in Bullen and Leake on Pleading, 3rd Edn., p. 44, in order to justify that cause of action, the money must belong to the plaintiff—and if the purchaser was suing, that would not be the case—or must be received or held by the defendant (the vendor) as belonging to the plaintiff, and, *ex hypothesi*, under the contract, in those circumstances, it would not belong to the purchaser, who is treated as the plaintiff in the note, but to the vendor. Therefore, the purchaser's claim here, in my opinion, fails. I do not think it necessary that I should add anything to the discussion which has taken place from the point of view of equitable practice as between vendor and purchaser. I prefer to hear what Clauson and Luxmoore, L.JJ., have to say on that. This appeal must be dismissed with costs.

Clauson, L.J.: In this appeal, counsel for the appellant very frankly admitted that, as regards the part of the order which related to the rescission of the contract, it was impossible to argue that there was anything in the Courts (Emergency Powers) Act, 1939, which required any condition precedent to be satisfied before such an order was made. Indeed, he admitted that, because the precise point was decided in Apr., 1941, in *Austins of East Ham, Ltd.* v. *Macey* (3), where the judgment of this court was delivered by Sir Wilfrid Greene, M.R., Goddard, L.J., and myself. There are some observations of Sir Wilfrid Greene, M.R., in that case referring to the possibility of there being a case where the vendor was seeking to obtain forfeiture of the deposit as well as to obtain rescission. That was not the position in the case then under consideration, although it had been the position in *Broadstairs Picture House, Ltd.* v. *Littman* (4), a decision of Bennett, J. I think I am right in saying that that decision, so far as it had to do with the matter before us in *Austins of East Ham, Ltd.* v. *Macey* (3), was approved by this court as being—so far, at all events—correct.

As regards the question of forfeiture of the deposit, I understood counsel for the appellant at long last to admit that he could not point to anything in the Courts (Emergency Powers) Act, 1939, which would necessitate some condition precedent being fulfilled before such an order could be made by the court. There again I do not know that it would be really practicable to argue to the contrary in this court, in view of the decision, to which again I was myself a party, with SCOTT and GODDARD, L.JJ., in *S. & A. Services, Ltd.* v. *Dickson* (5), where we held that, at all events as to part of the Courts (Emergency Powers) Act, 1939, s. 1 (2) (*a*), the statutory provision had reference to cases of self-help, and not to cases of judicial remedy. That, I think, made it difficult to argue that the words in sect. 1 (2) (*a*) (iv) "the forfeiture of any deposit" imported that that same condition precedent must be fulfilled before the court could make what is called an order for forfeiture of the deposit. The truth is, however, that the phrase "forfeiture of the deposit" is a little misleading. In the case now under appeal, the order that the deposit be forfeited to the plaintiffs really means nothing but this: "This is a judicial statement that the defendant has no right at law or in equity to recover the deposit from the plaintiffs or from the stakeholder." For myself, I am quite satisfied that counsel for the appellant was right in admitting that to the making of such an order the Courts (Emergency Powers) Act, 1939, has no application.

Then what is left in this appeal? Counsel for the appellant argued that the court had some dispensing power as regards making an order for the rescission of the contract and the forfeiture of the deposit in such cases as the present, where the plaintiffs, having found themselves in a position in which they could not adequately enforce the order for specific performance, were claiming the alternative relief of rescission, but he quite failed to persuade me that the court has any such dispensing power at all. The order, I think, has always been recognised as one which is to be made *ex debito justitiæ*. There have been certain cases in which this right to make an order dealing with a deposit has been dealt with, and, in some of them, the circumstances were such as to induce the legislature to deal with the matter in the Law of Property Act, 1925, s. 49 (2).

I entirely fail to recognise that the court had any dispensing power in the matter at all. I do not mean to say that the court has not power to extend the time possibly for carrying out the contract, or something of that kind, rather than make an immediate order for rescission, but, where the defendant is not prepared to carry out his contract, and where the plaintiffs are quite prepared, in the circumstances, to put an end to the contract, I do not see how the court can hesitate for a moment in giving the plaintiffs what they ask. The suggestion seems to have been that, owing to the particular circumstances of the war, the legislature has seen fit, in certain circumstances, to give the courts certain powers in certain defined cases to suspend the rights of litigants or the rights of some subjects against other subjects of the Crown, and that this court, in exercising its jurisdiction, ought, without any legislative sanction, to apply a general dispensing power where it thinks there is some sort of hardship caused by reason of the war. I know of no authority for any such proposition, and I do not believe that any such proposition is part of the law of England. Accordingly, in my view, the appeal necessarily fails.

LUXMOORE, L.J.: I agree, and do not think it necessary to add anything.

Appeal dismissed with costs. A

Solicitors: *Wigram & Co.* (for the appellant); *Baileys, Shaw & Gillett* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

WINCHESTER COURT, LTD. *v.* HOLMES.

[King's Bench Division (Stable, J.), **May 20, 1941.**] C

Landlord and Tenant—Notice to quit—Construction—Notice to terminate "at the end of the last quarter of this year."

The defendant was the assignee of a lease dated Jan. 11, 1937. The term began from Jan. 1, 1937, and the rent was payable on the usual quarter days. Under the terms of the lease, the defendant had the option of determining the tenancy at the end of the third year by giving 6 months' previous notice in writing. D On June 30, 1939, the defendant wrote to the plaintiffs giving "formal notice of termination at the end of the last quarter of this year." The plaintiffs contended that this notice was ambiguous, and, therefore, ineffective to determine the tenancy, inasmuch as it could have meant that the lease was to be determined as from Dec. 25, 1939, or, alternatively, Dec. 31, 1939, whereas it could be legally determined only as from midnight on Jan. 1, 1940:— E

HELD: the notice must be read in conjunction with the terms of the lease, and, therefore, the phrase "at the end of the last quarter of this year" meant "at the end of the current year's tenancy." There was, therefore, no ambiguity and the notice was effective to determine the tenancy.

[**EDITORIAL NOTE.** A notice to quit need not be in any particular form, and F it is not essential that the exact day on which the premises are to be given up shall be stated. The maxim *id certum est quod certum reddi potest* applies, and such words as "at the expiration of the present year's tenancy" have been held to be sufficient. The question as to the date of the termination of the tenancy, in accordance with the terms of the notice, should, however, be one of fact and not one of law. Thus, in *Phipps (P.) & Co. (Northampton & Towcester Breweries), Ltd.* v. G *Rogers* (3), a notice to quit "on the earliest day your tenancy can legally be terminated by valid notice to quit" was held to be ineffective. At the same time, there are authorities which have stressed the importance of the absence of any ambiguity in the notice, and it is with those cases that the present case should be compared.

As to Form and Construction of Notice to Quit, see HALSBURY, Hailsham H Edn., Vol. 20, pp. 135-138, paras. 145-147; and for Cases, see DIGEST, Vol.31, pp. 445-450, Nos. 5919-5971.]

Cases referred to:

(1) *Cadby* v. *Martinez* (1840), 11 Ad. & El. 720; 31 Digest 450, *5970*; 9 L.J.Q.B. 281; *previous proceedings* (1838), 2 Jur. 543.

(2) *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378; 31 Digest 440, *5866*; 64 L.J.Q.B. 200; 72 L.T. 62.

(3) *Phipps (P.) & Co. (Northampton & Towcester Breweries), Ltd.* v. *Rogers*, [1925] 1 K.B. 14; 31 Digest 448, *5947*; 93 L.J.K.B. 1009; 132 L.T. 240.
(4) *Gardner* v. *Ingram* (1889), 61 L.T. 729; 31 Digest 446, *5931*.

ACTION for recovery of rent. The facts are fully set out in the judgment.

H. J. Astell Burt for the plaintiffs.

L. G. H. Horton-Smith for the defendant.

STABLE, J.: By a lease dated Jan. 11, 1937, between Winchester Court, Ltd., and Captain Charles Ransom Toby, the landlord demised to Captain Toby No. 6, Winchester Court, Kensington, a flat in a large block of flats. The rent was £135 per annum, payable by equal quarterly payments in advance on the usual quarter days, and the term was stated to commence from Jan. 1, 1937. The lease provided for the broken period from Jan. 1, 1937, and the first quarter's rent was to be paid in advance on or before the premises were taken. The only other part of the lease to which I need refer is the last paragraph, which is as follows:

> It is further agreed between the parties hereto that the tenant shall have the option of determining the tenancy hereby created at the end of the third or fifth year by giving the landlord or his agent at least six months' previous notice in writing of his intention so to do.

That lease, it is common ground, was duly assigned by Captain Toby to the defendant, Major Richard Noble Holmes, by an assignment dated Feb. 8, 1938. Major Holmes was called up for military service and was anxious to exercise the right which he possessed by giving the requisite notice in writing to the landlord to determine the tenancy at the end of the third year of its existence.

My attention has been called to certain authorities, which, in my view, establish that, when the habendum provides that the lessee should hold the premises for the term of 7 years from Jan. 1, 1937, that means that the term began at that moment of time when Jan. 1 merges into Jan. 2, the very first tick on Jan. 2, 1937, and, accordingly, the end of the third year of this agreement—at which moment, by the prescribed notice, the tenant could determine the tenancy if he wished—came at midnight on Jan. 1, 1940.

By a letter, dated June 30, 1939, which was sent to the duly accredited agents of the landlord, and which I am satisfied was received by them on that day, Major Holmes wrote as follows:

> I hereby give you formal notice of termination at the end of the last quarter of this year.

It is said that that is ineffective as an exercise of the right conferred by the last paragraph in the lease which I have already read. Although it really has no bearing on what I have to decide—which is a pure question of construction of what the notice says—what happened is not altogether uninteresting. On July 6, the agents, on the notice

being sent, wrote apologising for the delay. They did not say that they
were in any doubt at all as to what the letter was intended to do or what
it meant, but they said that their clients had taken it to their solicitors,
who advised them that the notice was not legally in order. Major
Holmes put the matter into the hands of his solicitors, who were not A
unnaturally anxious to find out what was wrong with it, and the exception
which was then taken to the notice, on the correspondence, was that
it was a notice which determined the tenancy on the basis that the tenancy
was one not from Jan. 1, 1937, but starting on Jan. 30, 1937. To conclude
the story, at Michaelmas, 1940, Major Holmes paid the quarter's rent, B
which was payable in advance, for the period between Michaelmas and
Christmas, and, when Christmas came, he tendered a sum which he thought
represented the proportionate rent for the days intervening between the
expiration of the Christmas quarter and the end of the third year of
his tenancy. C

In my judgment, the question of construction presents very little
difficulty. I have no doubt that there is hardly a form of words or a
collocation of words in the English language which cannot be twisted
so as to make an absurdity, but that is not the attitude of mind in which
the court has to construe the written word which passes from hand to D
hand in everyday life. I agree, of course, that, if a notice of this kind
is bad on the face of it, the court cannot put the matter right. In
Cadby v. *Martinez* (1), the notice had been given for June 24, when in
fact the only notice which could legally be given was one for Michaelmas,
and the court held that, if the person to whom the notice was addressed E
had noticed the mistake which had been made, but had nevertheless
acknowledged receipt of the notice, this fact did not give validity to
what was, on the face of it, a thoroughly bad notice.

I have referred to a passage in Hill's Complete Law of Landlord
and Tenant, p. 426, and a similar passage in Halsbury's Laws of F
England, Hailsham Edn., Vol. 20, p. 135. I should also like to refer
to a passage in the judgment of Lindley, L.J., in *Sidebotham* v. *Holland*
(2). Lindley, L.J., in his judgment, in which Lord Halsbury,
a member of the court, concurred, said, at p. 383:

> The validity of a notice to quit ought not to turn on the splitting of a straw. G
> Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment
> of the anniversary ought to be just as good as a notice to quit on the last moment of
> the day before. But such subtleties ought to be and are disregarded as out of place.

My attention was also called, most properly, to *Phipps (P.) & Co.
(Northampton & Towcester Breweries), Ltd.* v. *Rogers* (3), in which the
owners of a public house gave their tenant a notice to quit in these terms: H

> We hereby give you notice to quit and deliver up to us . . . on the earliest day
> your tenancy can legally be terminated by valid notice to quit given to you by us at
> the date of the service hereof . . .

The Court of Appeal (Scrutton, L.J., dissenting) held that that was a
bad notice to quit. It is plain from the terms of the notice that all
the landlord is saying to the tenant is: "Find out the earliest date at

which your tenancy can legally be determined, and on that day, whatever you do, get out." The Court of Appeal said that that would not do. BANKES, L.J., who regarded the question the court had to decide in that case as a difficult one, said, at p. 20 :

> A much more difficult question to my mind is the question whether the notice to quit offends against the rule that a notice to be a good notice must be clear and unambiguous. It is not necessary that a notice should be clear and unambiguous in its expressed terms provided it can be rendered clear and unambiguous by the application of the maxim "*Id certum est quod certum reddi potest.*"

In the same case, ATKIN, L.J., dealt with the matter, at pp. 27, 28. He cited, at pp. 27, 28, the principle expressed by LORD COLERIDGE, L.C.J., in *Gardner* v. *Ingram* (4), at p. 730 :

> Although no particular form need be followed, there must be plain unambiguous words claiming to determine the existing tenancy at a certain time.

Then ATKIN, L.J., said, at p. 27 :

> BOWEN, J., in the same case, uses language to the same effect. The date of determination must be the right date. It may however be given alternatively, and it is sufficient if one of the alternatives, without expressing the actual date, denotes it in terms which enable the person receiving it to make it certain.

Then, dealing with the case before them, ATKIN, L.J., said, at p. 28 :

> But it appears to me to defeat the whole object of notice, to leave the date to be ascertained by the tenant as a problem not of fact but of law.

These principles have to be applied to the question of construction which I have to solve. It is expressly a formal notice of termination "at the end of the last quarter of this year," and I am invited to say that that is ambiguous because it may have conveyed the meaning that the tenant was seeking to determine the lease as from Dec. 25, 1939, or, alternatively, as from Dec. 31, 1939, whereas the lease could only be legally determined as from midnight on Jan. 1, 1940.

In my view, the clear construction of this notice is this. It is expressed to be a formal notice of termination, which means a notice of termination in conformity with the provisions in the lease which creates and defines the right which the notice is expressly seeking to exercise, and the notice says that the lease is to be determined "at the end of the last quarter of this year." I construe that to mean at the end of the last quarter of the third year of the tenancy. What else can "this year" mean ? Giving the words that perfectly natural interpretation, the notice is perfectly plain, and it is effective in achieving the purpose for which it was sent, with the result that Major Holmes' right to occupy the flat came to an end at midnight on Jan. 1, 1940, and his obligation to pay rent came to an end at the same time. The result is that the claim for rent accruing for the two quarters from Christmas, 1939, to Mar., 1940, and from Mar., 1940, to June, 1940, fails.

Action dismissed with costs.

Solicitors : *Wedlake, Letts & Birds* (for the plaintiffs) ; *Keene, Marsland, Bryden, Besant, Batham & Cork* (for the defendant).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

R. *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS, *Ex parte* EZEKIEL.

[King's Bench Division (Humphreys, Singleton and Tucker, JJ.), **May 6, 7, 8, 9, 26, 1941.**]

Extradition and Fugitive Offenders—Habeas corpus—Fugitive from India—No reference in warrant to Fugitive Offenders Act, 1881*—Duplicity of charges—Admissibility of depositions not taken for purposes of Act—Conclusiveness of expert's evidence as to Indian law—Court's discretion to postpone fugitive's return to India—Indian Penal Code,* 1860, *ss.* 120B, 420—*Fugitive Offenders Act,* 1881 (*c.* 69), *ss.* 2, 3, 5, 9, 10, 29.

Practice—Procedure—Propriety of barrister giving evidence when acting as counsel.

In Nov., 1935, on the application of the Indian government, a provisional warrant had been issued at Bow Street for the arrest of the applicant. In his absence from India, he had been charged there, together with a number of other persons, who had been arrested in Oct., 1935, with having conspired to commit offences under the Indian Penal Code, 1860, ss. 120B, 420. The applicant had left India in Apr., 1935. The provisional warrant was not executed until his arrival in England from Belgium in May, 1940. On an Indian warrant, dated June 3, 1940, and duly authenticated as required by the Fugitive Offenders Act, 1881, s. 3, the magistrate at Bow Street committed the applicant to prison to await his return to India. The applicant thereupon applied for a writ of *habeas corpus*. It was contended on behalf of the applicant (i) that he was not a fugitive from India within the Fugitive Offenders Act, 1881, because he had not fled from India to avoid arrest, (ii) that the warrant of June 3 was bad (*a*) because it was not expressed to be issued in the terms of, and for the purposes of, the Fugitive Offenders Act, 1881, and (*b*) for duplicity, (iii) that the depositions taken in India were not admissible on the hearing before the magistrate, since they did not purport to be taken for the purposes of the Fugitive Offenders Act, 1881, (iv) that the court was bound to accept the affidavit of an expert in Indian law that the charge was bad in law, as failing to disclose any offence known to Indian law, and (v) that the court should exercise its discretion under the Fugitive Offenders Act, 1881, s. 10, to discharge him or postpone his return to India on the grounds, *inter alia*, that the voyage to India would be dangerous, and that it would be difficult to ensure the presence in India of those witnesses who were then in England :—

Held : (i) a fugitive within the Fugitive Offenders Act, 1881, s. 2, is a person who is accused of committing an offence to which that part of the Act applies and who has left India. It is not necessary that he should have left India to avoid arrest.

(ii) by reason of the Fugitive Offenders Act, 1881, ss. 3, 5, no reference to that Act was required in the warrant, and, since the magistrate found that the evidence raised a strong presumption that the applicant had committed an offence named in the warrant, being one to which the Act applied, it was immaterial that the warrant might contain another charge.

(iii) under sect. 29, the depositions were not rendered inadmissible by reason of the fact that they did not purport to be taken for the purposes of the Act.

(iv) the court was not bound to accept as conclusive the affidavit of an expert in Indian law. Its duty was to interpret the relevant statutes itself, with such help as it might obtain from the expert's affidavit.

(v) the circumstances of this case and the existence of a state of war did not justify the court in the exercise of its discretion under sect. 10 in refusing to send the applicant back to India.

(vi) a barrister should not act as counsel and witness in the same case.

[**EDITORIAL NOTE.** The difficulties and dangers of travel to India at the present time were here urged in favour of the exercise of the discretion of the court under the Fugitive Offenders Act, 1881. The court has, however, held that this is not the sort of consideration which should be taken into account in deciding whether or not to make the order, and that, in the circumstances of this case, the order ought to be made.

AS TO RETURN OF FUGITIVES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 544-553, paras. 1046-1069; and FOR CASES, see DIGEST, Vol. 24, pp. 890-893, Nos. 150-161.]

Cases referred to:

(1) *R.* v. *Nillins* (1884), 53 L.J.M.C. 157; 24 Digest 869, *7*.

(2) *R.* v. *Godfrey*, [1923] 1 K.B. 24; 24 Digest 869, *8*; 92 L.J.K.B. 205; 128 L.T. 115.

(3) *Rodgers* v. *Richards*, [1892] 1 Q.B. 555; 33 Digest 322, *375*; *sub nom. Rogers* v. *Richards*, 66 L.T. 261.

(4) *Re Counhaye* (1873), L.R. 8 Q.B. 410; 24 Digest 883, *103*; 42 L.J.Q.B. 217; 28 L.T. 761.

(5) *De Beeche* v. *South American Stores* (*Gath & Chaves*), *Ltd., and Chilian Stores* (*Gath & Chaves*), *Ltd.*, [1935] A.C. 148; Digest Supp.; 64 L.J.K.B. 101; 152 L.T. 309.

(6) *Buerger* v. *New York Life Assurance Co.* (1927), 96 L.J.K.B. 930; Digest Supp.; 137 L.T. 431.

(7) *R.* v. *Brixton Prison* (*Governor*), *Ex p. Percival*, [1907] 1 K.B. 696; 24 Digest 891, *152*; 76 L.J.K.B. 619; 96 L.T. 545.

APPLICATION for a writ of *habeas corpus*. The facts are fully set out in the judgment of HUMPHREYS, J.

A. S. Comyns Carr, K.C., and *G. O. Slade* for the applicant.

G. D. Roberts, K.C., *C. E. Bagram* and *Vernon R. M. Gattie* for the first respondent.

G. B. McClure for the second respondent.

HUMPHREYS, J.: This is an application for a writ of *habeas corpus* at the instance of David Ezekiel. The applicant was committed to prison on Mar. 7, 1941, by order of the Metropolitan Police Magistrate sitting at Bow Street, to await his return to India in accordance with the provisions of the Fugitive Offenders Act, 1881. He was later admitted to bail by order of a judge, and is still on bail. The charge upon which he was ordered to be committed is to be found set out in para. 1 of his affidavit as follows:

> That between Jan. 1, 1929, and Dec. 31, 1935, he was a party to a criminal conspiracy with Solomon Ezekiel, R. E. Thebith and Charles Granatstein and other persons to cheat liquor vendors as well as members of the public by fraudulently or dishonestly inducing them to buy and pay for spirits in bottles as genuinely imported foreign liquor with labels and capsules representing that the contents thereof were genuinely imported foreign liquors of certain descriptions and quality and produced and bottled in Scotland, England, France and other foreign countries and thereby committed an offence punishable under the Indian Penal Code, 1860, s. 120B, read with the Indian Penal Code, 1860, s. 420.

The references to the sections of the Indian Penal Code to be found in that document are necessitated by the Fugitive Offenders Act, 1881, s. 9, which provides that that part of the Act, which is the only part of the Act with which we are concerned in this case, shall apply to certain named offences—namely, treason and piracy—and to every other offence which is for the time being punishable in that part of Her Majesty's dominions in which it was committed by imprisonment with hard labour for a term of 12 months or more.

It is necessary, therefore, to glance at those sections of the Penal Code, 1860, to see what they purport to enact. The Indian Penal Code, 1860, s. 420, which creates an offence very similar to the offence known in England as obtaining money or goods by false pretences with intent to defraud, provides as follows :

> Whosoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person . . . shall be punished with imprisonment for a term which may extend to 7 years.

Section 120B provides that whoever is a party to a criminal conspiracy to commit an offence punishable with imprisonment for a term of two years or upwards may be punished in the same manner as if he had abetted the offence. It is necessary to glance at sect. 109 of the Code in order to see that an abettor may be punished with the punishment provided for the principal offence, which in this case is 7 years' rigorous imprisonment. Therefore, *prima facie* the commitment is right in saying that those two sections are sections which create an offence which comes within the terms of sect. 9 of the Act.

In order to follow some of the points which have been made on behalf of the applicant, it is necessary to state a few facts and dates. The applicant was, for some years before 1929, the principal partner in Davidson & Co., dealers in wines and spirits in Calcutta. In 1931, Davidson & Co. became Davidsons, Ltd., the applicant being the governing director of, and a principal shareholder in, that company. That was the state of affairs on Oct. 20, 1935, when a police raid took place upon various premises in Calcutta, including the premises belonging to Davidsons, Ltd. In certain premises in Calcutta, there was found by the police upon that occasion an illicit distillery. The result of that raid was that 38 persons were arrested, many of them being connected with Davidsons, Ltd. The precise form of the charges against those persons were not before the court, but the charges undoubtedly included one similar to that in the present case, and probably also a charge of conspiracy to defraud the Excise by getting out of bond raw spirit imported from Java without paying the appropriate duty. This was alleged to have been done by bribing Customs officials to pass the spirit as having been methylated, in which case a much lower duty would have been payable. The allegation was that this spirit, together with that made in the illicit distillery above referred to, was used as the basis of a liquor which was sold to purchasers with false labels and capsules as genuine Scotch whisky or French brandy. The conspiracy to defraud the Excise is, we were told, punishable with 6 months' imprisonment only, and, therefore, would not come within the terms of sect. 9 of the Act. For this reason, it was not included in the charge formulated at Bow Street upon which the magistrate was invited to, and did, commit the applicant. I entertain no doubt, however, that the evidence in support of that charge would be relevant and admissible upon the charge upon which the applicant was committed. The applicant himself was not included in the number A of those arrested on Oct. 20, 1935, since he had left India in the previous April, it having been his custom for some years to spend the period of the hot weather in Europe, but he was named in the charges as a co-conspirator with those actually charged.

On the application of the Indian government, a provisional warrant for B his arrest was issued by a magistrate at Bow Street on Nov. 19, 1935. The applicant, however, was not found by those whose duty it was to arrest him upon that warrant, and in fact he was not in England, as is now known. He was not arrested upon that warrant until May 17, 1940, when he arrived at Folkestone as a refugee from Belgium, where he had been C living. The Indian warrant required by sect. 3 of the Act is dated June 3, 1940, and it is not disputed that it has been duly indorsed, and authenticated as required by the Act.

In those circumstances, the duty of the magistrate is to be found set out in the second paragraph of sect. 5 of the Act as follows:

> D If the indorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act), according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return . . .

The evidence before the magistrate in this case included some depositions E taken in India against the 38 persons above referred to, and the magistrate came to the conclusion that the evidence did raise a strong or probable presumption against the applicant.

It was admitted in argument before us that the depositions did disclose the existence of the conspiracy alleged, and, further, that the evidence F of one witness, Medhora, clearly implicated the applicant. Counsel for the applicant did, indeed, draw our attention to the fact that Medhora was an admitted accomplice, but, since the law of India with regard to the evidence of accomplices does not differ from that of England, that fact would not even tend to invalidate the magistrate's finding. The Indian G Evidence Act, 1872, s. 133, provides as follows:

> An accomplice shall be a competent witness against the accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

A fortiori, a committal for trial would not be illegal on that ground. As H a matter of fact, I agree with the contention of counsel for the first respondent that there is to be found in these depositions corroboration of Medhora's evidence implicating the applicant, and, in my opinion, it is not necessary to pursue that matter any further.

The first point seriously taken by counsel for the applicant before us was that the applicant was not a fugitive from India within the meaning of the Fugitive Offenders Act, 1881, because it was not shown that he fled from India to avoid arrest, though it is obvious, and it is not disputed, that he remained away from India because of the criminal proceedings there. In truth, however, the Act itself defines the meaning of the word "fugitive" as used in the Act. Sect. 2 provides as follows :

> Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions [may be arrested and so forth].

All that is necessary, therefore, is to show that the applicant is a person accused of having committed an offence in India and that he has left India, when he becomes, in the words of the Act, a person in the "Act referred to as a fugitive from" India. I would add that, in my opinion, the two decisions of this court in *R.* v. *Nillins* (1) and *R.* v. *Godfrey* (2), decided upon the very similar definition of "fugitive criminal" to be found in the Extradition Act, 1870, are in point, and support the view which I have expressed.

The next point taken was that the warrant of June 3, 1940, was bad, first, because it is not expressed to be issued in the terms of, or for the purposes of, the Fugitive Offenders Act, 1881, and, secondly, for duplicity. As to the first of these contentions, no authority was cited to us, and, in my judgment, no support for it is to be found in the Act itself. The relevant sections are sect. 5, which has already been read, and sect. 3, which provides as follows :

> Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities [including one of the magistrates of the metropolitan police court at Bow Street], if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant [and that is a sufficient warrant for the arrest of that person].

All that is required in this case, therefore, is a warrant issued in India by a person having lawful authority to issue it, duly indorsed and authenticated in the United Kingdom, for an offence to which the Act applies. These requirements are all fulfilled by the warrant in question. If the warrant had contained some words relating to the Fugitive Offenders Act, 1881, those words would not have affected in the least its force or validity.

As to the second contention, though I am not satisfied that the warrant was intended to charge two offences, I agree with counsel for the applicant that the language of the warrant is capable of that construction. I think that it was probably intended to charge one conspiracy to effect two illegal objects. However that may be, what we have to consider is not whether the warrant may be irregular in substance or in form as charging two offences, but whether the committal for one of those offences is rendered void by the inclusion in the warrant of another charge upon which no committal was asked for or has been ordered. It is clear that by English law no objection to a warrant on the ground of duplicity can be effective, although the prosecution may be called upon to elect : *Rodgers* v. *Richards* (3). We were not referred to any relevant clause in the Indian Criminal Procedure Code, 1898, dealing with the question of duplicity. In my opinion, the offence as to which the magistrate has found that the evidence raises a strong or probable presumption that the fugitive committed it being an offence mentioned in the warrant and one to which the Act applies, we are bound to hold that the magistrate was right in committing the applicant, notwithstanding that the warrant may contain another charge, which, I think, in the circumstances, can be regarded as mere surplusage.

The remaining objection argued by counsel for the applicant was to the admissibility of the depositions taken in India. The relevant section of the Fugitive Offenders Act, 1881, is sect. 29, which provides in the first three paragraphs as follows :

> A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.
>
> Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act.
>
> Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence.

The question turns upon whether the "depositions" mentioned in the second paragraph must, like those mentioned in the first paragraph, be "depositions" taken "for the purposes of this Act."

In spite of the argument to the contrary of counsel for the first respondent, I think that these depositions cannot be said to have been so taken. They may have been taken with the knowledge, and perhaps the intention, that, if the applicant was arrested, they would be used in his case, but primarily they were taken for the purpose of the trial in India of the persons then before the court, and they certainly do not purport to be taken for any purpose of the Fugitive Offenders Act, 1881. However, I have come to the conclusion that the two paragraphs are dealing with quite different matters, and that there is no justification for inserting the word "such" at the commencement of the second paragraph. Sect. 29 is the only section in the Act under the head : "Evidence." The first part of the section permits any magistrate to take depositions for the purpose of the Act in the absence of the person accused. The second part of the section deals with the admissibility in evidence before the committing magistrate of depositions and the like taken by others, whether in the presence or in the absence of the accused, when they are duly authenticated, and it is obviously sufficiently wide in its terms to include the depositions in this case. I do not think that we are called upon to decide the broad and perhaps difficult question discussed at the bar as to whether the second paragraph of sect. 29 authorises the reception in evidence in proceedings under the Act of depositions taken anywhere, at any time, in any proceedings, civil or criminal, to which the accused may have been a stranger. It is to be observed that, by sect. 39 of the Act, "deposition" includes "any affidavit, affirmation, or statement made upon oath." The depositions in this case were taken in proceedings with which the accused was closely connected and concerned, and to which he was as much a party as is consistent with his being at the same time a fugitive from India. But for that fact, the depositions would have been taken in his presence.

The language of the second paragraph of sect. 29 is obviously taken A
direct from the corresponding provision in the Extradition Act, 1870, s. 14, with the exception of the words " (whether taken in the absence of the fugitive or otherwise) ", and we were referred to *Re Counhaye* (4), in which BLACKBURN, J., in the course of his judgment, observed, at p. 416 :

> We are, I believe, also all agreed that sect. 14 makes depositions properly B
> authenticated evidence in proceedings under the Act, whether they are taken in the particular charge or not, and whether taken in the presence of the person charged or not.

It is true that in the Extradition Act, 1870, there is not to be found any provision corresponding to the first part of sect. 29 of the 1881 Act, but,
so far as it is applicable, the decision does, I think, support the contention C
of the prosecution as to the admissibility of these depositions. In my opinion, they were not rendered inadmissible by reason of the fact that they were not taken " for the purposes of this Act," and the point fails.

The remaining reasons urged for the exclusion of the depositions were
stated as being (i) that they were bad for misjoinder of persons and charges, D
and (ii) that they were inadmissible because in some cases only parts of the depositions were forwarded from India, and because some of them contained references to exhibits of which neither the originals nor copies were available at Bow Street. These contentions appear to me to lose
sight of the fact that the magistrate at Bow Street was not concerned with E
the regularity or otherwise of the trial in India. The magistrate made no complaint of the inadequacy of the material placed before him. If there was sufficient relevant evidence before him to raise the presumption referred to in sect. 5, that is all that is required. Since we were informed that
more than 200 witnesses were examined in India and over 2,000 exhibits F
were referred to in the depositions, it is not surprising that a selection had to be made for the purpose of the proceedings at Bow Street. As has already been stated, the depositions will not be admissible against the applicant if ever he takes his trial in India, and there is no suggestion in
this case that material evidence helpful to the accused has been suppressed, G
or that the remainder of the depositions were not sent over for any reason other than that they were irrelevant to the case against the applicant. In my judgment, therefore, the depositions were properly admitted in evidence by the magistrate.

The last matter requiring consideration was raised by counsel for the H
applicant in the course of his reply. He referred the court to an affidavit which had been read by one Joseph Nissim, a barrister in India, in para. 6 of which he expresses the opinion that the charge in this case is bad in law, in that it fails to disclose any offence known to the law of India. Counsel did not himself argue the point, but submitted that the court was bound to accept that statement of an expert in Indian law, since, in his

view, there was no evidence to the contrary. The point having been taken, I feel bound to state, though I do so with regret, that I am quite unable to treat the affidavit by Nissim as a statement of Indian law such as the courts are in the habit of accepting in cases where foreign law (and, for this purpose, Indian law is to be treated as foreign law) has to be ascertained. The deponent does not pretend to be in any sense an independent expert. His description of his own position is as follows :

> During the progress of David Ezekiel's case before the magistrate at Bow Street, I was instructed on Jan. 9, 1941, as an expert in Indian law to advise counsel briefed on behalf of David Ezekiel.

He proceeds as an advocate to criticise the evidence, pointing out, for example, that no evidence was given in the depositions that in the bazaars in India spirits distilled from Java sugar may not, either in law or in recognised trade practice, be described as Scotch whisky. He then refers to the affidavit of the applicant in support of this application, and continues as follows :

> I desire to make the following comments upon these references to matters of Indian law . . .

It is in his first comment on that affidavit that there occurs the statement relied upon on behalf of the applicant. The affidavit, which is a long one, is, in my opinion, far from being a reliable statement of Indian law. It is in truth nothing more than a forensic argument.

In those circumstances, in my opinion, the court would be justified in interpreting for itself, with such help as it might obtain from Nissim's affidavit, the relevant statutes: see the opinion of VISCOUNT SANKEY, L.C., in *De Beeche* v. *South American Stores* (*Gath & Chaves*), *Ltd., and Chilian Stores* (*Gath & Chaves*), *Ltd.* (5). VISCOUNT SANKEY, L.C., said, at pp. 158, 159 :

> While it is true that witnesses called to prove foreign law may refer to any passages in the code of their country as containing the law applicable to the case, the court is at liberty to look at those passages and to consider what is their proper meaning.

There is also a lucid exposition of the law and practice relating to the proof of foreign law to be found in the judgment of ATKIN, L.J., in *Buerger* v. *New York Life Assurance Co.* (6). In the present case, however, the court is not without the assistance of an expert upon this very point. The prosecution was no doubt familiar with the decision in *R.* v. *Brixton Prison* (*Governor*), *Ex p. Percival* (7), in which LORD ALVERSTONE, L.C.J., referred to the Fugitive Offenders Act, 1881, s. 9, as follows, at p. 706 :

> I understand the meaning of that provision to be in substance that there must be, in order to justify an order being made under this Act, an offence punishable in the part of His Majesty's dominions where it is alleged to have been committed by [imprisonment with hard labour for a term of twelve months or more]. In my opinion, every person who comes and asks for an order for the delivery up of a fugitive offender must be prepared with evidence that that condition of the statute has been fulfilled.

Accordingly, a barrister with knowledge and experience of Indian law was called before the magistrate and he gave, *inter alia*, the following evidence :

> As an expert on Indian law, do you say that the charge here fulfils the statutory requirements of the Fugitive Offenders Act, 1881, s. 9 ?—Yes.

The evidence of the witness on this point was not challenged in cross-examination. It is sufficient to say that, for my part, having looked at the relevant sections of the Indian Penal Code, 1860, I accept that evidence in preference to that given by Nissim in his affidavit. In my judgment, this application for a writ of *habeas corpus* should be refused.

A We have heard to-day a further application, of which due and proper notice was given on behalf of the applicant, for an order of some nature under the Fugitive Offenders Act, 1881, s. 10, which provides as follows:

> B Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just.

C Obviously, in this case, no suggestion was made, or could be made, that the case was of a trivial nature, or that the application was not made in good faith in the interests of justice, but it was suggested, first of all, that the applicant was in a state of health which would render it dangerous if he were to be returned to India at the present time. That is because at D the present time we are more or less at the commencement of the the period of hot weather in India, and we are told that for some years the applicant has been in the habit of spending those months in England or in Europe, returning to India about October or November. Affidavits by medical men were produced before us stating that those medical men, having E examined the applicant, had come to the conclusion that he was suffering from a certain illness which would render it dangerous for him to go back to India and take his trial there during the hot weather. On the part of the prosecution, the applicant had been examined by certain other medical experts, who came to an exactly opposite conclusion, and thought F that there was nothing the matter with him which would make it improper for him to be sent back to India either now or at any other time. That being so, the court, with the consent of both parties, appointed Sir William Willcox to report to the court his opinion of the correctness of one or other of those views. He has reported to the court as to the state G of the applicant's heart after an exhaustive examination of the applicant and of an electric cardiograph, which was taken by another doctor, and after having made such inquiries as he thought desirable from other doctors, his examination of the applicant in fact having been made in the presence of the applicant's own medical advisors. Copies of that report H have been before the parties, and the suggestion that the court should act upon the views expressed by the doctors retained by the applicant is not persisted in, and, indeed, could not be persisted in, in view of that report.

However, there are other grounds which are urged. It is said, and it is said truly, that conditions at the present time are such that there is considerable danger and risk to be apprehended by any person who has to go to India from England. That is perfectly true. It applies to all such persons as in fact are, and have to be in the ordinary course of their duties, whether military or civil, travelling between India and England at the present time. It will not apply to the applicant in any greater degree than it will apply to those other persons.

It is further said that there are certain witnesses who were called at Bow Street before the magistrate as witnesses for the prosecution, and whose evidence, for some reason or other, the accused desires to have in India. If those witnesses, who, in the view of the prosecution, afford material corroboration of the evidence of the accomplice against the accused, do not go back to India, as has already been observed, so much the better for the accused. However, whether or not they will go back to India we do not know, nor are we required, in my view, to inquire. The getting of witnesses from England to India is a matter to be decided by the prosecution or by the defence, whichever side may desire to get them there. Neither of them has any compulsory powers to make witnesses go to India. If the witnesses do not go to India, the trial will have to take place without them, whether they are witnesses for the prosecution or for the defence or both. It is not a matter in which this court can interfere in any way.

Then it is said that this is a case in which the witnesses with regard to whom counsel for the applicant invites us—and I think entirely without authority—to assume that they will not be able to go to India, and will not go, are the persons who corroborate an accomplice in this matter, and he says that, if those witnesses do not go to India, it would be useless to send the accused to India, because, the evidence of the accomplice being then uncorroborated, the trial would be futile. Not only is that in direct contradiction of the law in India which has already been read in the course of this judgment, which allows a conviction to take place upon the uncorroborated evidence of an accomplice, and which in terms provides that no conviction shall be illegal on that ground, but it assumes—again without authority—that, if those particular persons do not go to India, nobody else can be found in India who can give similar evidence. For my own part, I cannot for a moment agree that that is the position, though I am not saying that it would affect my mind if it were. I have listened to the various grounds put forward, which really amount to no more than that it is a hardship upon anybody, in the present state of affairs, to be sent to India. Very likely it is, particularly if the individual does not want to go to India, and it is quite clear that David Ezekiel is very anxious not to go to India, but I do not think that the law ought to be interfered with for any of those reasons.

Having expressed my own view that the order of the magistrate was right, that it was rightly made, and that this application for a writ of *habeas corpus* ought to be refused, I only add my own view that this court is not called upon—and, indeed, ought not—to make any order of any sort under the terms of sect. 10.

There is a short observation which the other members of the court desire me to make and with which I agree. It has been brought to the attention of the court that, on the hearing at Bow Street, junior counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as counsel in the case. No A objection was taken to this by counsel on the other side. We think it right to point out that this was irregular and contrary to practice. A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as both counsel and witness in the same case.

B

Singleton, J.: I am of the same opinion. I do not think it necessary to add anything to the judgment which has been given by Humphreys, J., on that part of this application which is directed to the writ of *habeas corpus*, but I do desire to say something with regard to the further application which is made to us under the Fugitive Offenders Act, 1881, s. 10. C It was submitted by counsel for the applicant that, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, it would be unjust or oppressive, or too severe a punishment, to return the fugitive to India, either at all or until the expiration of a certain period. The period which he mentioned was the duration of the D war. In other words, he asked us to make an order, in all the circumstances of the case, either discharging the fugitive or ordering that he be not returned to India until after the expiration of the war. The circumstances of the case to which he directed our attention are dealt with to some extent in the affidavit of the applicant. In the first place, E the question of health was raised. The report of Sir William Willcox is as follows:

> In my opinion it would not be dangerous to the life or health of Mr. D. Ezekiel that he should be returned to India there to take his trial during the hot season, say May to November, provided that he takes the usual precautions of a resident in India against the hot climate and the isolation from home. F

Having regard to that report, I think that, in so far as the application is based upon health, it fails.

Then, in connection with distance and facilities for communication and all the circumstances of the case, counsel for the applicant dealt with the question of corroboration. He pointed out that it might be difficult for G the prosecution to secure the attendance of certain witnesses in India. Humphreys, J., has referred already to the Indian Evidence Act, 1872, s. 133, the latter part of which is as follows:

> . . . and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. H

We were told by counsel for the applicant that the practice on this matter is the same in India as it is in England, and, if it be so, quite clearly, as I think, we could not make any such order as is asked by the applicant, because of any question of corroboration. Having regard to sect. 133, it is not essential to a conviction that there should be corroboration in a case of this kind either at Bow Street before the magistrate or in India.

Further, counsel for the applicant said that in England such cases are tried by a jury, and, though it is open to a jury to convict upon a proper direction, there being no corroboration, they must be given a proper direction, and they must be given a warning. He suggested that the position would be different if the case were before a judge alone. I do not know why it should be different. A judge who had to sit alone upon such a matter should no doubt weigh with the greatest care the evidence of an accomplice, but, if it is open to a jury to convict, in my view, it is also open to a judge to convict, if he exercises that proper caution which he would direct a jury in another class of case to exercise. In any event, I take the view that in this case there was some corroboration. Counsel for the applicant asked us to assume that the prosecution would not be able to secure the attendance of the witness or witnesses who would provide the necessary corroboration. I do not know why, on an application of this kind, we should assume that, but, if it be so, it may well be that the prosecution can prove in some other manner the matters with which those witnesses, or some of them, deal, or can provide other corroborative evidence.

In para. 11 of the affidavit of the applicant, difficulties which he may have in securing the attendance of his own witnesses are also dealt with. Obviously, in such a case, it must be difficult. It must be difficult in every case, whether it arises in peacetime or in wartime. For this reason, counsel for the applicant puts it forward as a ground why we should make an order in the manner provided in the Fugitive Offenders Act, 1881, s. 10. Again, it must not be assumed that it will be easy for witnesses on either side to be taken to India after the war. If they are alive, they will all be a little older. Their health may not be so good.

The argument which counsel for the applicant advances is really this: "For the purposes of this case, suspend the operation of the Fugitive Offenders Act, 1881, during the war." It seems to me that that is a matter for Parliament. It is not a matter for this court. It is true that it is our duty to take all the circumstances of the case into consideration, and, for myself, I have sought to consider them, and realise the difficulties that are created, but, on the other hand, those difficulties, as has been pointed out by counsel for the first respondent, are very largely created by the applicant himself. The applicant knew in 1935 that he was wanted in India. He did not want to go back there. He stayed in Belgium for a long time, and, when he arrived at Folkestone in May, 1940, because Belgium became unhealthy, he was met by the police. He now says in effect: "Do not send me back to India at this stage, because the war has intervened." The war did not commence until some 4 years after the applicant had left India. He has known of the position all the time. When he was arrested, he had in his pocket certain press cuttings in relation to these proceedings in India, and he also had three letters to which it may be useful to refer. The first, dated Oct. 30, 1935, was from one Thorpe, associated with him in India, and begins as follows :

> I suppose that by this you must be aware of the trouble through which Davidsons, Ltd. and Solly [Solomon Ezekiel] are passing.

Later in the letter there is this sentence :

> This firm was searched by the local Excise, who have sealed up my stocks of Green Leaf brandy and House of Lords whisky.

The third of the letters, dated Mar. 29, 1936, mentions these proceedings in India, and then says :

> The charges will be tried tomorrow . . . I find in the newspaper cuttings that your name is down as an absconding accused.

Therefore, from 1936 at least, the applicant has known that that was how he was described in some newspaper in India. He has known since 1935, indeed, that his presence was desired in India.

As I have said already, there can be no more reason for making such an order in favour of this applicant as we are asked to make by his counsel than there can be for making such an order for any other fugitive from any dominion. The risks of going to India, as far as we know, are no greater than those of going to Canada, Australia, or anywhere else. It is inconvenient, and it is difficult. Both sides must be considered. For myself, I am satisfied that there is no reason why we should make an order either discharging the fugitive or ordering that he be not returned to India until after the expiration of some period. I think that the application under the Fugitive Offenders Act, 1881, s. 10, fails, as well as the application for the writ of *habeas corpus*.

TUCKER, J. : I agree that the application for the writ of *habeas corpus* and the application under the Fugitive Offenders Act, 1881, s. 10, fail, for the reasons stated in the judgments which have been delivered. I only desire to add a few observations of my own on one of the points raised on behalf of the applicant in support of his application for a writ of *habeas corpus*—namely, that the charge upon which he has been committed under the Fugitive Offenders Act, 1881, discloses no offence known to Indian law. As we find ourselves unable to accept the evidence on this point of the expert of repute and experience in Indian law relied on by the applicant, I think that it is right that I should state my reasons in my own words. I have approached the matter bearing in mind that it is not ordinarily the function of this court to substitute its own interpretation of a foreign statute for the sworn testimony of an expert as to the fact of what the foreign law is on a particular matter, which may depend partly on the construction placed upon the relevant statute by the courts of the foreign country. None the less, there may be cases in which the court finds itself unable to accept the testimony of a foreign lawyer, even in the absence of contradictory expert evidence. In my opinion, this is one of those cases. The passage relied upon in Nissim's affidavit is to be found in para. 6 (*b*) as follows :

> The charge is not one of mere criminal conspiracy which has not resulted in any overt acts, but of criminal conspiracy to commit the overt offence of cheating under the Indian Penal Code, 1860, s. 420. Failure to allege or to establish that a specified person or persons have been actually cheated destroys the foundation for the allegation of such a conspiracy.

In other words, there can be no offence of a conspiracy to murder, for example, unless someone is in fact murdered as a result of the conspiracy. Nissim states no authority for such an astonishing proposition, and makes no reference to any section of the Indian Penal Code, 1860, as tending in any way to support it. Sects. 120A and 120B, which are the sections of the Code dealing with criminal conspiracies, make it clear that, in the case of a conspiracy to commit an offence, it is the agreement which constitutes the crime, irrespective of whether or not any act is done in pursuance thereof.

In dealing with this matter, counsel for the applicant suggested in his argument that what Nissim intended to say was that, in the case of a conspiracy to commit the offence created by sect. 420, it is essential to allege a conspiracy to cheat one or more named persons. That, however, is something quite different from what Nissim has stated in the paragraph which I have read, and I confine myself to dealing with the perfectly clear statement in his affidavit. The submission of counsel for the applicant, however, tends to confirm my view that the passage which I have quoted cannot really accurately represent Nissim's view as to Indian law on the matter.

With regard to the application under the Fugitive Offenders Act, 1881, s. 10, I think that all the matters relied upon by counsel for the applicant are matters which it is proper should be brought to the notice of the court on an application of this kind where the discretion of the court is sought, but I have considered all those matters, and, assuming, without deciding, that there is no corroboration in this case, I do not think that the applicant has made out a case for the exercise of the court's discretion under that section. I therefore agree that both these applications should be refused.

Application refused.

Solicitors: *Warren & Warren* (for the applicant); *Solicitor to the India Office* (for the first respondent); *Director of Public Prosecutions* (for the second respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CHIPCHASE *v.* CHIPCHASE (OTHERWISE LEETCH, OTHERWISE MATTHEWS).

[Probate, Divorce and Admiralty Division (Henn Collins, J.), **June 12, 1941.**]

Husband and Wife—Marriage—Banns—Publication in false name—Knowledge of both parties—Married woman using her maiden name—Marriage Act, 1823 (*c.* 76), *s.* 22. A

The respondent was married in 1915 Shortly afterwards her husband deserted her and she had not seen or heard of him since 1916. In 1928 she married the petitioner. For this marriage the banns were read in her maiden name and she was married in that name. The respondent B had, however, disclosed her previous marriage to the petitioner and it was proved that for at least a period of two years before her second marriage she had been commonly known by her maiden name. It was found as a fact that she had given her maiden name, not because she thought she would mislead people by using her true name, but because inconvenience might arise from using that name. The petitioner asked for a decree of nullity on the ground that the marriage was void for C undue publication of banns:

Held: the provisions of the Marriage Act, 1823, s. 22, were directed against the concealment of identity for the purpose of avoiding inquiries. The marriage in 1928 was, therefore, invalid, and the petitioner was entitled to a decree.

D

[**EDITORIAL NOTE.** The position in the case of the publication of banns is that a wrong name must be given intentionally and its falsity must be known to both parties. In the present case it is rather assumed that the maiden name was a false one, but there may well be cases where a woman separated for many years from her husband has acquired by reputation a name the same as her maiden name. Even in such a case, it is said that there are indications in the authorities that the use of the maiden name would be improper. In this case, however, the question E resolves itself into a question of the intention with which the maiden name was used, there being no contention that both parties were not cognisant of the true facts.

As to Publication of Banns, see HALSBURY, Hailsham Edn., Vol. 16, pp. 572, 573, para. 859; and for Cases, see DIGEST, Vol. 27, pp. 46-49, Nos. 246-298.]

Cases referred to: F

(1) *Chipchase* v. *Chipchase*, [1939] P. 391; [1939] 3 All E.R. 895; Digest Supp.; 108 L.J.P. 154.

(2) *Orme* v. *Holloway* (*falsely calling herself Orme*) (1847), 5 Notes of Cases, 267; 27 Digest 47, *259*.

Husband's Petition for nullity on the grounds (i) that at the time G of the marriage the respondent was already married to another man, although no evidence was offered of the continuance of such marriage, and (ii) that the marriage (after banns) was void for undue publication of banns. The facts are set out in the judgment, but are more fully stated in the previous proceedings, reported [1939] 3 All E.R. 895. H

C. O. Herd for the petitioner.

H. G. Garland for the respondent.

Henn Collins, J.: This is a case which has had a curious history. The present phase of it is the husband's suit for nullity on the grounds that, to the knowledge of both himself and the respondent, the respondent was married in a name which was not her lawful name, and that the marriage was bigamous on her part. The husband does not for one moment pretend that he was in any sense deceived. If there was fraud, he was a party to it. Thus, since, in answer to his wife's summons for maintenance before the magistrates, he put forward as a defence what he now puts forward as a substantive cause of suit, one does not feel that his defence or suit has any merit. However, that is not a matter which I have now to consider. All I have to consider is a question of law as it arises on the facts before me.

First of all, I think that I ought to refer to the earlier history of the case, because the application to the magistrates on the part of the wife resulted in the case coming before the Divisional Court. I was a party to the decision in that appellate jurisdiction, and the judgment of the court throws light on the question which I have now to investigate as a question of fact, and it throws light on the law which I have to apply to the facts when I have found them. I think that the upshot of that part of the case which is now material is this. In the previous proceedings, *Chipchase* v. *Chipchase* (1), SIR BOYD MERRIMAN, P., dealing with the proper construction of the Marriage Act, 1823, s. 22, said, at p. 397 ([1939] 3 All E.R., at p. 899):

> The same appears even more emphatically in the judgment of SIR H. JENNER FUST in *Orme* v. *Holloway* (*falsely calling herself Orme*) (2), where he says the construction of this Act is that, in order to set aside a marriage on the ground of undue publication of banns, it is necessary for both the parties to be cognisant of fraud; it is necessary first to prove that there has been a fraud and secondly, that both parties were cognisant of the fraud and knowingly and wilfully entered into the marriage without due publication of banns.

That case was sent back to the magistrates because the court was of opinion that they had not directed their minds to one possible aspect of the facts—because, of course, the Divisional Court was not deciding any question of fact—namely, whether the present respondent had given her maiden name in order, so to speak, to enforce her identity, because she was known among her associates by that name, or whether it was done for the purpose of deceiving or misleading people, and concealing the fact that she was a married woman. That question was remitted to the magistrates. Unfortunately, it did not come before them. It comes before me for decision on the question of fact, and I have to ask myself, first of all, which of the two versions of the facts given by the respective parties in this suit, in so far as they differ, I accept. I find the wife's story the more convincing. She gave her maiden name because it would have raised difficulties if she had described herself as a married woman, and, in fairness to the husband, I think that it is right to say that he was probably correct in saying that it would have raised more acute difficulties in church than elsewhere. It might have been a bar to a marriage in church. It was not done in the ordinary sense of endeavouring to conceal the fact that she was the woman known by that name, because that was the name by which, as I have said, she was known to her associates. That was not the trouble. However, I am not sure that that is the full and only test. It is perfectly true that it may not be sufficient to state merely your legal name, if that is one by which you are known. I am not deciding that point, because it is not necessary that I should, but there are indications in the authorities that even that might be enough to prevent the banns from being duly published. However, I have first and last to ask myself whether this name was given because to give any other name would have been misleading, or whether it was given because it served to conceal—or at any rate, not to emphasise—the fact that she was already married. Of those two alternatives, my conclusion, on the facts, is that the latter was the case. It was not because she thought she would mislead people by using her true name, but because of the inconveniences, whatever they might be, of using her married name.

The judgment in the previous proceedings, *Chipchase* v. *Chipchase* (1), no doubt indicates that one of the matters which the magistrates were to consider was whether the intention of the wife in giving the name was to conceal her identity and, if I address the same question to myself in regard to the facts I have found, I have first to ascertain what exactly is meant by concealing her identity. She did not conceal her identity from the persons who knew her by that name. She did not conceal it, no doubt, from those in her parish who knew her by that name. However, I think that one of the purposes of the Act of Parliament would be defeated if it were open to a person to say : "I am known here in my parish by such-and-such a name, and if I gave another, persons might make the most uncomfortable and difficult inquiries." I think that that is one of the very things the Act of Parliament was directed against, and, although I do not think that there is any moral obliquity in this particular instance, I think that there has been an infraction of the statute, and, much as I regret it, for the reason I first stated, I think that this marriage was not a marriage in law. Therefore, all that remains for me to do is to pronounce a decree of nullity.

Decree of nullity granted.

Solicitors : *Large & Co.* (for the petitioner) ; *Wingfields, Halse & Trustram* (for the respondent).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

FOX *v.* NEWCASTLE-UPON-TYNE CITY COUNCIL.

[COURT OF APPEAL (MacKinnon, Luxmoore and du Parcq, L.JJ.), **June 12, 13, 1941.**]

Emergency Legislation—Duty to light street—Air-raid shelter in highway—Cyclist injured by colliding with shelter—Power of local authority to erect shelter—Lighting—Civil Defence Act, 1939 (c. 31), *ss.* 9, 13—*Lighting (Restrictions) Order,* 1939 (*S.R. & O.*, 1939, *No.* 1098).

Highways—Obstructions—Air-raid shelter in roadway—Lighting—Common law duty to persons using highway.

On the night of Sept. 26, 1940, the respondent, while riding a pedal bicycle along a street in Newcastle-upon-Tyne, collided with an air-raid shelter which had been erected in the street by the appellant council. The respondent claimed damages for personal injuries received and for the loss of his bicycle, on the grounds that the air-raid shelter was a nuisance and that the appellant council had been negligent in not lighting it, or otherwise making it visible :—

HELD (DU PARCQ, L.J., *dissenting*) : although the shelter had been erected after the imposition of the restrictions on lighting, there was no obligation upon the appellant council, either by statute or at common law, to light it, and, therefore, the respondent was not entitled to recover.

[**EDITORIAL NOTE.** In a dissenting judgment, DU PARCQ, L.J., has distinguished this case from the similar cases recently decided by reason of the fact that the obstruction in the highway was in this case erected after the lighting restrictions had come into force. It should be noted that, while his analysis of the common law principles affecting the matter bears a striking resemblance to that of HUMPHREYS, J., in *Lyus v. Stepney Borough Council* (3), he agrees with the Court of Appeal decision in that case that, if the erection was not a nuisance at the time of its erection, it would not become one afterwards. He, however, distinguishes the present case, for the reason that, in the conditions prevailing at the time of the erection of the air-raid shelter, for all practical purposes it was an invisible obstruction in the highway, and, therefore, a nuisance at common law. The other Lords Justices have held the case to be indistinguishable from the recent decisions, but, since leave was given to appeal to the House of Lords, it may be that the divergence in judicial opinion may be tested.

AS TO INDICATING OBSTRUCTIONS ON THE HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436 ; and FOR CASES, see DIGEST, Vol. 26, pp. 392-395, Nos. 1187-1212.]

Cases referred to :

(1) *Greenwood* v. *Central Service Co., Ltd.* (*St. Marylebone Borough Council, Third Party*), [1940] 2 K.B. 447 ; [1940] 3 All E.R. 389 ; Digest Supp.

(2) *Wodehouse* v. *Levy* (*St. Marylebone Borough Council, Third Party*), [1940] 2 K.B. 561 ; [1940] 4 All E.R. 14 ; Digest Supp. ; *revsg.* [1940] 3 All E.R. 137.

(3) *Lyus* v. *Stepney Borough Council*, [1940] 4 All E.R. 463 ; Digest Supp. ; *revsg.*, [1940] 4 All E.R. 75.

(4) *Great Central Ry. Co.* v. *Hewlett*, [1916] 2 A.C. 511 ; 38 Digest 16, *88* ; 85 L.J.K.B. 1705 ; 115 L.T. 349 ; *revsg.*, 114 L.T. 713.

(5) *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430 ; 38 Digest 25, *137*.

(6) *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193 ; 38 Digest 44, *256* ; 50 L.J.Q.B. 353 ; 44 L.T. 653 ; *affg.* S.C. *sub nom. Hill* v. *Metropolitan Asylum District Managers*, 49 L.J.Q.B. 228.

(7) *R.* v. *Pease* (1832), 4 B. & Ad. 30 ; 38 Digest 46, *275* ; 2 L.J.M.C. 26.

(8) *Vaughan* v. *Taff Vale Ry. Co.* (1860), 5 H. & N. 679 ; 38 Digest 23, *127* ; 26 L.J.Ex. 247 ; 2 L.T. 394.

(9) *Penny* v. *Wimbledon Urban Council,* [1899] 2 Q.B. 72; 26 Digest 410, *1308*; 68 L.J.Q.B. 704; 80 L.T. 615; *affg.,* [1898] 2 Q.B. 212.

(10) *Baldock* v. *Westminster City Council* (1918), 88 L.J.K.B. 502; 26 Digest 392, *1190*; 120 L.T. 470.

Appeal by the defendants from an order of His Honour Judge Richardson in the Newcastle-upon-Tyne County Court, dated Mar. 18, 1941. The facts are fully set out in the judgment of MacKinnon, L.J.

Montague L. Berryman for the appellants.

J. G. Kekwick for the respondent.

Berryman: The shelter was completed on the day before the occurrence of the accident. The county court judge said that the council was negligent in failing to make use of the permissive powers it possessed under the Lighting (Restrictions) Order, 1939. The council, however, was not bound to light the shelter, and cannot be held liable for negligence for having failed to light the shelter. In *Lyus* v. *Stepney Borough Council* (3), it was held that, where there was statutory power given to erect an obstruction, a duty to light it was not imposed by the permissive powers given by the 1939 order. [Counsel referred to *Greenwood* v. *Central Service Co., Ltd.* (*St. Marylebone Borough Council, Third Party*) (1) and *Wodehouse* v. *Levy* (*St. Marylebone Borough Council, Third Party*) (2).]

Kekwick: The present case is not necessarily bound up with *Lyus* v. *Stepney Borough Council* (3), as that case related to an omission. There is no case which says that a person is not liable if damage is caused by his doing a positive act. Even if lighting had been entirely prohibited, the council could have taken some precaution, such as painting the structure white. In the present case, the council knew that the obstruction was dangerous. If there is power to erect an obstruction on a highway, all reasonable steps must be taken to prevent any one from being injured by it, not only during the course of its erection, but also by its maintenance afterwards. [Counsel referred to *Geddis* v. *Bann Reservoir Proprietors* (5).]

Berryman, in reply, referred to *Geddis* v. *Bann Reservoir Proprietors* (5), *Lyus* v. *Stepney Borough Council* (3) and *Baldock* v. *Westminster City Council* (10).]

MacKinnon, L.J.: The plaintiff, on the night of Sept. 26, 1940, was riding a pedal bicycle along a street in Newcastle. He collided with a structure in the highway with such violence that the bicycle was apparently a "constructive total loss" and he sustained some personal injury. The obstruction has been erected by the defendant corporation. He accordingly sued the corporation for damages, basing his claim upon an allegation that the structure was a nuisance or upon an allegation that there was negligence on the part of the defendants in not having warned him of its presence by putting a light upon it or by painting it with luminous paint. The only further fact to be stated, I think, is that the structure was an air-raid shelter which had been erected by the defendants pursuant to the powers given them by the Civil Defence Act, 1939, s. 9, which provides as follows :

> . . . the local authority may provide a public air-raid shelter on any highway and may for that purpose construct works in or on the highway . . .

Those being the facts, the county court judge gave judgment, in which he referred to certain cases which had been decided by this court, and he did so in these terms :

> It is quite clear from *Greenwood* v. *Central Service Co., Ltd.* (*St. Marylebone Borough Council, Third Party*) (1), *Wodehouse* v. *Levy* (*St. Marylebone Borough Council, Third Party*) (2) and *Lyus* v. *Stepney Borough Council* (3), following *Great Central Ry. Co.* v. *Hewlett* (4), that there was no duty or obligation thrown upon the corporation to light the shelter in question in this case, either under statute or at common law.

I think that that was a correct interpretation as a result of those cases, and, if there were no obligation thrown on the corporation, either under statute or at common law, to light the shelter, it would seem to follow that there ought to be judgment for the defendants. However, the county court judge continued as follows :

> However, the fact that they have permission to display lights in certain circumstances would seem to leave open the question whether, in the special circumstances of this case, reasonable care was taken under the ordinary law of negligence.

As a matter of expression, I do not understand the whole of that sentence, because, if there was no duty, either under statute or at common law, it is difficult to see how, under the second part of that assertion, there is left open the question whether they had failed to use reasonable care under the ordinary law of negligence, which must be part of the common law. For my part, as to *Greenwood's* case (1), *Wodehouse's* case (2) and *Lyus* v. *Stepney Borough Council* (3), to which I was a party, I must accept them, and I think that they were rightly decided. If there is any error in them, it must be corrected by a superior tribunal. I think that the result of those cases, which, in my view, were rightly decided, is that the county court judge was right in saying that there was no obligation either by statute or at common law upon the defendant corporation to light this shelter, and that, therefore, the plaintiff's case fails. The only possible distinction between the facts in those cases and in the present case is that in those cases the particular obstruction—a sand-bin in one case and a bollard in the centre of the road in the other two cases—had been erected pursuant to statutory powers before the date at which the obligation or power of the local authority to light the streets had been abrogated by the lighting order, whereas in this case the shelter had been erected after that obligation or power to light the streets had been abrogated. I cannot think that that distinction can make any difference in the result, and, if it were so, it would have the startling consequence that the borough surveyor or engineer concerned with the business part of the corporation in regard to a street might consult the town clerk as to his legal liability. The town clerk would have to go down the streets with him and say : " Here is a bollard in the centre of the road. Here are trees planted along the side of the street. Here is a raid post or pillar box. Here is that hideous statue of the Victorian mayor in the centre of the road. Here is a sand-bin. All these were erected before we were forbidden to light the streets, but, if there is any post or structure which you have erected since we A were forbidden to light the streets, you must be very careful to put a light upon that post or structure." It does not follow that, because absurdities are sometimes the consequence, a rule of law is wrong, but that, I think, only illustrates the way in which it strikes me. If *Greenwood's* case (1), *Wodehouse's* case (2) and *Lyus* v. *Stepney Borough Council* B (3) were rightly decided, as I think they were, I cannot think that the fact that this particular obstruction, erected under statutory powers in the highway, was erected after the power or obligation to light the streets had been forbidden to the corporation can or ought to make any difference in the result as regards their duties. As a result, I think C that this appeal should be allowed, and the judgment should be reversed and entered for the defendants with costs.

Luxmoore, L.J. : I agree that this appeal should be allowed. The case before the county court judge was argued on the footing that the D air-raid shelter with which the plaintiff came into contact was erected in accordance with the statutory provisions which authorised its erection, and was, therefore, not an unlawful obstruction or a nuisance at common law. On this basis, the case would appear to me to be covered by the recent decisions to which MacKinnon, L.J., has referred. The county E court judge appears to have recognised this, for he said in his judgment that it was quite clear from those cases, following *Great Central Ry. Co.* v. *Hewlett* (4) :

> . . . that there was no duty or obligation thrown upon the corporation to light the shelter in question in this case, either under statute or at common law.

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If that is correct, it seems to me that the only logical result is the dismissal of the action. However, the county court judge went on to say that, although there was no statutory or common law liability, it would be a reasonable thing for the shelter to be distinguished either by a lamp or by white paint, and, as the defendants had power to use a lamp of a G permitted capacity and to whiten either the whole or part of the shelter, and did not take advantage of either of those powers, they must be held liable. That seems to me to be a strange result, if there is no statutory or common law liability to light or paint. In this court, as I understand the argument, it was sought to justify the decision on the grounds that H the statutory requirements had not been fulfilled and that the shelter constituted a nuisance because it was erected at a time when the Lighting (Restrictions) Order, 1939, was in force, and that, consequently, the shelter was not erected in accordance with statutory requirements, because the existence of the restriction made it, I suppose, imperative to provide a light of the permitted nature, to build the shelter of suitable materials to render it more visible during the hours of darkness, or to paint it (or part of it) white. This point was not raised in the court below, and, in view of the admission that the shelter was in accordance with the statutory requirements, it seems to me not to be open to the respondent in this court. However, even assuming that the point is open to him, I feel that I cannot spell out any such requirement from the Civil Defence Act, 1939, which by sect. 9 authorised the erection of the shelter in question. The Act received the Royal Assent on July 13, 1939. It was passed before war broke out, and obviously in contemplation of war, yet there is no qualification in regard to the manner in which, or the materials of which, the air-raid shelter is to be constructed, nor is there any provision with regard to the necessity for lighting such a shelter during times when lighting restrictions may be in force, although I find in sect. 13 of that Act a direction with regard to the issue by the Minister of a code prescribing requirements with which a shelter must comply in the case of private shelters and shelters in factories. Further, the provision of a light after the shelter has been erected is not, I think, in any way connected with the process of erection, and I cannot appreciate how it can be said that the failure to provide a light after the shelter has been erected can affect the question of whether the shelter has been properly erected. In my judgment, there is no substantial ground on which to distinguish this case from the decisions to which reference has already been made.

Therefore, I am of opinion that the county court judge ought to have dismissed the action, and I agree with MACKINNON, L.J., that this appeal should be allowed with costs.

DU PARCQ, L.J.: I have the misfortune to differ from MACKINNON and LUXMOORE, L.JJ. I feel much impressed by their unanimous decision, especially as they have had the opportunity (which I have not) on a previous occasion of giving very careful consideration to cases superficially, at any rate, resembling this one. But for the doubt and the diffidence which are naturally created in my mind by this impressive unanimity, I am bound to confess that I should have thought this a reasonably plain case, and, taking the view which I do of authorities binding upon this court, I should have thought that we could take no other course except to affirm the decision of the county court judge.

The facts are simple enough. The plaintiff was riding his bicycle. It is found as a fact that he was not himself guilty of any negligence whatever. There was an air-raid shelter on a highway. He did not know it was there. He could not see it, as the county court judge has found, because it was very difficult to see it under the prevailing conditions, and it had not been painted white, nor was any light exhibited. The question then arises whether that obstruction on the highway can be justified, and the answer of the defendant authority is that it is justified because, by the Civil Defence Act, 1939, s. 9, they were permitted

—it is of some little importance that the authority was permissive—to provide a public air-raid shelter on any highway, and for that purpose to construct works and affix appliances and so on. I want to read only one passage from the county court judge's judgment. It may be that in parts of his judgment his language is not altogether felicitous, but there is one passage in the judgment which seems to me to be conclusive of the matter, since it is not in doubt that there was evidence to support his findings of fact. He says:

> In the case which I have to consider, the shelter had, for the reasonable safety of the public, to be painted when completed. It had been completed. It had not been painted, owing to the bad weather, and this seems to me to be an occasion when any reasonable official of the corporation in charge of the erection would have thought it not only proper and advisable but also essential that the power to light allowed under the Lighting (Restrictions) Order, 1939, should be exercised, especially as this obstruction had been erected in a street of some importance.

He finds, further, that, if there had been such a light, the accident would not have happened. The question is whether, on these findings of fact, the plaintiff is entitled to recover. In this case, as in many others, reference has been made to what was said by LORD BLACKBURN in *Geddis* v. *Bann Reservoir Proprietors* (5). We know that that statement of the law has sometimes been misunderstood, but I think that in this case it is very applicable to the facts. It is interesting because as long ago as 1878 LORD BLACKBURN in the House of Lords thought it unnecessary to go through all the cases and contented himself with summarising them. I read only one short passage, at p. 456:

> . . . I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, " negligence " not to make such reasonable exercise of their powers.

As I understand the general rule, it is this. Statutory authority may be given in general terms, as here, to erect a public air-raid shelter. Sometimes Parliament may authorise a particular building, but here the authority is given in general terms. It does not follow, because it is given in general terms and no specific directions are given, that, therefore, the body entrusted with the work can build anything which comes within the general description in the Act. Parliament need not go into detail, and often does not go into detail. It is put in this way in SALMOND ON TORTS, 9th Edn., 1936, p. 49:

> Absolute authority is authority to do the act notwithstanding the fact that it necessarily causes a nuisance or other injurious consequence. Conditional authority is authority to do the act provided it can be done without causing a nuisance or other injurious consequence. This condition is sometimes expressed but is more often left to be implied from the general provisions of the statute.

Then there is a reference to *Metropolitan Asylum District* v. *Hill* (6), in which there are some very valuable observations, in the opinion of LORD WATSON particularly, to which I think it unnecessary to refer in detail now. I think that in the present case it is an implied condition (and I will say a word more about that presently) that the public air-raid shelter which may be built on the highway must be so built that it will cause as little obstruction as possible to the highway. There is another class of case where the precise thing is authorised, and the distinction is brought out very clearly in *Metropolitan Asylum District* v. *Hill* (6). After the matter has been investigated by a parliamentary committee, Parliament, having seen the plans, details and drawings, may authorise the promoters to build that very building. It may be the most dangerous building in the world, but, if Parliament has said it may be built in that form, then it may be built in that form, and nobody can bring an action by reason of damage caused by the danger which it creates. My own view of *Great Central Ry. Co.* v. *Hewlett* (4) in the House of Lords is that it is really an illustration of the same principle as that stated in those cases to which I am now referring, which say that, where the precise thing is authorised, no complaint may be made of the building erected. *Great Central Ry. Co.* v. *Hewlett* (4) was a curious case so far as the facts were concerned. Something existed which was a nuisance on the highway—field gates and posts—and all that Parliament did was to say, knowing that this nuisance existed and had existed for some years down to 1901, when they were judicially held to be an obstruction on the highway: " The company may maintain those posts and gates, and may replace them when necessary." In other words, the court having said, " Here is an obstruction on the highway which is a nuisance," Parliament said, " Never mind. It may be an obstruction, but you may maintain it. You need not alter it. You need not light it. You need not do anything. You may maintain it." When it was argued in that case that what I have stated as the general principle applied, the answer was that *Hewlett's* case (4) was an exception and not within that general principle at all. Lord Sumner said, at pp. 523, 524:

> The analogy which led the Court of Appeal to decide for the respondent was that of *R.* v. *Pease* (7), *Vaughan* v. *Taff Vale Ry. Co.* (8), and *Geddis* v. *Bann Reservoir Proprietors* (5). With great respect, I think it was inapplicable on two grounds. In the first place, those are cases where the legislature had authorised undertakers to do overt acts which in the natural course of things were likely to prejudice members of the public. The present is a case in which, without any action at all, the respondents were authorised to leave something undone namely the abatement of what previously had been a nuisance. They were merely to maintain a *status quo*, the natural results of which could not prejudice anybody, for if the place was lighted, no one ought to run into the post at all, since he could see it, and if, owing to fog for example, the place was in darkness, no one ought to be injured by the post, since he had no business to drive so fast as to be damaged if he did run into it. In the second place, in such cases the authority in question is given in general terms; it is, for example, authority to work railways and to run railway trains in the undertakers' discretion; hence it is reasonable to infer that the legislature, in using such general terms, and in authorising for the undertakers' benefit what would otherwise be a nuisance, meant them to exercise their authority with reasonable care, and not without it.

If one looks at the first part of that statement, it is plain that this is a case where the legislature has authorised undertakers to do overt acts which in the natural course of things—I would add unless reasonable care is taken—are likely to prejudice members of the public. It is not a case of maintaining a *status quo*. It is not as if Parliament had said: " You have put up something which is an obstruction to the highway. You may maintain it." Parliament is saying: " You may construct a public air-raid shelter." The permission is in general terms, and it seems to me that it is reasonable to infer (I will look again in a moment at the precise words of the Act) that the legislature means the undertakers to exercise their authority with reasonable care, and not without it. The other rule of law which I must deal with is that established by the cases recently decided in this court, which are binding upon us, and which I do not desire to question in any way. I am referring to *Lyus* v. *Stepney Borough Council* (3) and the other cases. I understand those cases to decide that, when the question arises whether statutory powers have been exercised reasonably, one must look at the date at which they were exercised. If, for instance, one has authority to erect sand-bins at a time when the conditions to which we were accustomed before the war prevailed, and if sand-bins are erected which are reasonably safe in those conditions, then there is no statutory duty and no common law duty on the responsible undertakers by reason of the change in those conditions. If they put up sand-bins in 1938 which were then perfectly safe from the point of view of the public, they did not come under a new duty when the black-out regulations, which did not exist before, came into force. That seems to me to be made perfectly clear if I may read, for instance, a few words from the judgment of Luxmoore, L.J., in *Lyus* v. *Stepney Borough Council* (3), at p. 468 :

> In our judgment, the question whether the erection of the sand-bin would hinder the reasonable user of the street by the public or any other person was one to be considered at the time when the sand-bin was erected, and if at that time there was no such hindrance, it is difficult to see how at some later date it could be said that the sand-bin had become a hindrance to the user of the street.

In each of those cases, which it is said are binding upon us here, one finds that the obstruction had been erected with every care, or at all events with all reasonable care, in the conditions prevailing at the time of its erection. That does not seem to me to touch what I conceive to be the question in this case. As to that, I should like to make this further remark about the words of the section. Everybody knows what a public air-raid shelter is and what its purpose is. It is not a permanent erection, I hope. I do not suppose that it is intended that air-raid shelters shall continue to exist on the highways when air-raids have ceased. It is something which a local authority is told it may build to provide against air raids. When there are air raids at night, there will be darkness in the ordinary course. I cannot think that it is wrong to say that, when Parliament said "an air-raid shelter," it must have intended a building which can safely be used as an air-raid shelter and which will not cause any unnecessary danger to the King's subjects when they are upon the highway. I emphasise the word "unnecessary" because it may be that, in the prevailing circumstances, there must be some danger to people upon the highway where there is an obstruction which cannot perhaps be very well lighted. Nobody would say, for instance, that, if the air-raid shelter were so constructed that it was badly ventilated and caused the asphyxiation of a large number of people using it, its construction could be justified by the Act. Nobody would say that, if the architect thought it desirable to put ornamental spikes round it, or some other adition to its architectural features which was dangerous to people using the highway, because it could be called an air-raid shelter, its construction in that form was authorised. I cannot see why one has only to have regard to the people inside the shelter, and not to those using the highway outside, and, indeed, I do not think that it would be suggested that one has. Therefore, it seems to me that the county court judge takes a perfectly reasonable view when he says that, if one is constructing a highway shelter, which must go on existing during a time when there will be no light, and must be the less dangerous the more visible it is, it is a mere matter of reasonable common sense (and Parliament did not need to say it in express terms) that one must build it so that it is as plainly visible as possible. Indeed, it is to be noted in this case, as one would expect, that the defendant council took the view that it ought to be made as plainly visible as possible, and were proposing to paint it white. They had not painted it white because they had not had time, owing to the weather, but they were proposing to do so, and, if it had been painted white, this accident would not have happened. I cannot see that, because Parliament did not say, "You must not make an air-raid shelter which it is impossible for a motorist or a cyclist, or perhaps even a pedestrian, to see in time to avoid running into it, if you can make one which is reasonably visible," therefore it may be said, "We can make an air-raid shelter which nobody could be expected to see at all." That does not seem to me to be a reasonable interpretation of the statute, and, with respect, it seems to me to be unsound as a matter of general legal principle. In those circumstances, I do not think it matters whether one regards this as a completed structure or as an uncompleted structure. If one regards it as a completed structure—and, so far as mere structure is concerned, it was completed—then the local authority had built and put on the road something which they could have made a great deal safer than it was by the exercise of reasonable care, and, as they failed to exercise that reasonable care, and put upon the highway an obstruction which was more dangerous than it need have been, in my view, it is not justified or authorised by this Act of Parliament. Alternatively, one can say that it was not yet complete, and that is what the county court judge in substance has found, although he says that it was complete. I am not criticising him about that, because it is a mere matter of words, and a very unimportant matter, but we were told by counsel for the appellants that this unfortunate accident happened in an intermediate period when there had not yet been time for local authorities generally to take all the steps they would have wished to take. Let me deal with it on that footing for a moment. Here is a building which the local authority knew would not be safe until they had painted it white, and they intended to paint it white. In that sense, one may say that it was not a complete structure. Supposing that they had been building it and, in the course of building it, they had, whilst it was unfinished, left a heap of stones on the road. Nobody doubts for a moment that, if somebody had been injured by falling over that heap of stones, an action could have been brought against them, because they were not exercising their undoubted statutory powers with reasonable care. If their excuse here is, "We are very sorry. We had not quite finished. If you had given us another week or two, it would have been painted, but we had not quite finished the work," then, as a matter of principle, although the facts are obviously different, I find it quite impossible to distinguish between the leaving on the road of a heap of stones or other obstruction in the course of doing the work and the leaving on the highway of an unfinished building, which has not been finished in the sense that it has not been painted in order to make it safe. I think that in principle the two cases are the same. I would quote, if I may, half-a-dozen lines from the judgment of VAUGHAN WILLIAMS, L.J., in *Penny* v. *Wimbledon Urban Council* (9), at p. 77:

> In cases like the present, where a statutory authority has power to do something to a road which involves stopping it, or to do something to it which will make it dangerous while it is being done, there is a duty cast upon them to take care that the Queen's subjects are not injured by any carelessness in the doing of that which has to be done.

If a building is being erected and it is known that it will not be safe until it is painted white or in some other way made more plainly visible, I think that it is carelessness, or, at any rate, the judge was fully entitled to find on those facts that it was carelessness, to leave it during that period of transition, when it has not yet been rendered safe, without such protection to the public as the provision of a light could give. The appellants could have provided a light. It is quite true that circumstances may arise in which they will not be able to provide a light, but I am not concerned with that. They could have provided a light, and they did not. For myself, I entirely agree with the county court judge that, in so doing, they were guilty of negligence, and that there is nothing whatever in the statute to absolve them. I should not myself have been alarmed by the consequences, which MACKINNON, L.J., has pointed out might follow, that the town clerk and the surveyor would be in a difficulty, because they might have to light some obstructions and not others. The point I am endeavouring to make is that the date when the building is constructed has to be considered If, when the building is being constructed, or has been constructed, looking at it in the then existing circumstances, it is found that there has been some failure to do what any reasonable person would have known he ought to do, then, in my view, the undertakers can be held liable, and I cannot see that that places upon a local authority any greater burden than that of showing reasonable intelligence, which I am sure is not more than one ought to be entitled to demand from them.

For these reasons, which I have endeavoured to explain, and with all the hesitation which I genuinely feel because of the difference of view between myself and the majority of the court, I am quite clearly of opinion (I say it with the greatest respect) that this appeal ought to be dismissed. However, the result, of course, having regard to the judgments which have been delivered, is that it must be allowed.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Collyer Bristow & Co.*, agents for *John Atkinson*, Town Clerk, Newcastle-upon-Tyne (for the appellants); *Ward, Bowie & Co.*, agents for *Hodnett, Parkin & Barker*, Newcastle-upon-Tyne (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re KNAPTON, KNAPTON *v.* HINDLE AND OTHERS.

[Chancery Division (Simonds, J.), **May 29, June 13, 1941.**]

Wills—Gift of similar properties to several persons—No express provision as to selection—Some devisees described as a class—Right of selection—Selection by lot.

The testatrix by her will made the following devise: "One house to each of my nephews and nieces and one to Nellie Hird one to Florence Knapton one to my sister one to my brother." No indication was given as to which house was to go to which devisee, and it was contended on behalf of the next of kin that the gift was void for uncertainty:—

Held: the gift was valid, and the right of selection by the devisees went in the order in which they were named in the will, but, as between nephews and nieces, in default of agreement, the right of selection was to be determined by lot.

[**EDITORIAL NOTE.** A testator who has several properties all having the same description may give one of them to each of several named donees, and, if he gives no direction as to how the selection is to be made, the donees have the right to choose in the order in which they are named in the will. In the present case, however, a further difficulty arose by reason of the fact that some of the donees were collectively referred to as nephews and nieces. The fact that these donees were not named prevented the application of the above rule, and, since no English decision could be found which enunciated any rule applicable to the case, recourse was had to the Roman Civil Law. Testamentary matters were in earlier times administered by the ecclesiastical courts and many of the doctrines applied are derived from the Roman Civil Law. From that law the court has found a rule applicable to circumstances analogous to those herein and has decided that, in the case of the nephews and nieces, the selection, in default of agreement, must be made by lot.

As to Rights of Selection, see HALSBURY, Hailsham Edn., Vol. 34, pp. 36, 37, para. 30; and for Cases, see DIGEST, Vol. 44, pp. 214-216, Nos. 407-431.]

Cases referred to:

(1) *Duckmanton* v. *Duckmanton* (1860), 5 H. & N. 219; 44 Digest 216, *427*; 29 L.J.Ex. 132.

(2) *Richardson* v. *Watson* (1833), 4 B. & Ad. 787; 44 Digest 612, *4396*; 2 L.J.K.B. 134.

(3) *Asten* v. *Asten*, [1894] 3 Ch. 260; 44 Digest 214, *407*; 63 L.J.Ch. 834; 71 L.T. 228.

(4) *Tapley* v. *Eagleton* (1879), 12 Ch.D. 683; 44 Digest 216, *425*.

Summons to determine, *inter alia*, by what method priority should be given to certain devisees in the will of the testatrix, Annie Knapton. The facts are fully set out in the judgment.

Sir Norman Touche for the plaintiff.

W. F. Waite for the first defendant.

R. J. T. Gibson for the remaining defendants except the last.

H. O. Danckwerts for the last defendant, the Attorney-General.

Simonds, J.: The testatrix, Annie Knapton, died possessed of a number of small houses which she disposed of by her will. She was obviously *inops consilii* and the language which she has chosen to dispose of her property is not always the best. The words she used were the following:

> I give and bequeath my estate as follows: My property 253, Great Horton Road for a women's institute for Great Horton single women first except for one married lady Mrs. Hindley of Bank Top, the tenant Mrs. Benson to be offered my house at 1, Farnham Road when this plan can be made feasible. One house to each of my nephews and nieces and one to Nellie Hird one to Florence Knapton one to my sister one to my brother . . .

The testatrix has not indicated which house is to go to which devisee, and has not expressly indicated who is to have the first choice of a house. Accordingly, it has been argued on behalf of the next of kin that the devises either way are void for uncertainty. I think that, apart from the initial difficulty which arises out of the devise of "one house to each of my nephews and nieces," I have little difficulty, upon the authority of cases decided in this court, in deciding that the gift is a good one, and that choice is given to the several devisees in the order in which they are named. Authority for that will be found first in *Duckmanton* v. *Duckmanton* (1). In that case, the facts were that the testator:

> . . . being seised in fee of two freehold closes of land in R., by his will devised to his son John one freehold close of land in R., and to his son George one freehold close of land in R. John was the testator's heir-at-law. After the death of the testator John and George tossed up for choice and George won: Held, that the devise to John was not void for uncertainty, and that the case was one for election.

In his judgment in that case, Pollock, C.B., said, at pp. 222, 223:

> It was admitted that, if he [the testator] had devised one to John and said nothing as to the other, the devise would have been good. So, if he had devised one to George, it would in like manner have been a good devise. But he devised one to each, and it is said that the devise must therefore mean nothing; I cannot understand that. We have not to decide whether John or George was the person who had a right to elect. John cannot be in a better situation because he has elected.

Then Martin, B., carried the matter a little further. He said, at p. 223:

> The testator has in clear terms said, I devise to John Duckmanton and his heirs one freehold close of land. He had two such closes. If he had said, I give one close to John and his heirs, it is admitted that the devise would have been good. So, if he had said, I give one close to John and *the other* to George, it is admitted that the devise would have been good. Does the testator by his will say, I wish John to have one field and George the other? Surely it is no strained construction to say that it means, I wish John to have one close and the other close to go to George. On the point of election I have some doubt. But it does not arise upon this rule. My idea of election is that it is exercising a choice, not trusting to chance.

Then Watson, B., said, at p. 224:

> It is clear that he intended both to pass by his will. It is said that this construction is at variance with the case of *Richardson* v. *Watson* (2). That is not so. There it was proved that there were two closes answering the description in the will, and it was uncertain what passed. The word " close " means one close, and there was nothing to show upon what the gift was to operate. But here both closes were in Ridgway Field, and on the face of the will the testator devises both. Why should there not be an election here ? The uncertainty is, who is to make the election. It may be the person first named in the will, who takes both by devise and as heir-at-law. We are not embarrassed by the mode in which the election took place.

That case is not an express decision that the right of selection is in order of priority of name. In *Asten* v. *Asten* (3), ROMER, J., said, at pp. 262, 263 :

> A testator who has several properties, all having the same description, may by his will give one of them to a legatee, and leave the choice of that one to the legatee ; and such a gift is clearly valid. And the fact that the legatee is to be able to select may appear either by express words used in the will, or by reasonable inference from it. And, *prima facie*, if the testator gives one of such properties to a legatee without saying more, then the reasonable inference is, that the testator intended the legatee to select ; and this whether the fact appears on the face of the will that the testator had several such properties, as in *Duckmanton* v. *Duckmanton* (1) or whether the fact otherwise appears, as in *Tapley* v. *Eagleton* (4). And I should myself be prepared to hold that, where a testator gives one of such properties to each of several legatees, then he intends (*prima facie*) to give the right of selection to the legatees according to the priority of the bequests.

That would be authority sufficient for me to come to the conclusion that here the devises in favour of the named or described persons were valid and that the right of selection was given to the several devisees in the order of their names. However, the matter is complicated by the fact that the initial devise is : " One house to each of my nephews and nieces." There were in fact one nephew and two nieces, and it is said, and said justly, that the rule which I have indicated can have no application where there is a gift of that character, because no nephew or niece is named so that priority can be given in the order of name. Upon that, when the matter was last before me, it occurred to me that there was something in the civil law which might perhaps be of some assistance, for it is the fact that a large part of our law in regard to testamentary dispositions is taken from the civil law. Accordingly, I adjourned the case in order that a search of the matter might be made by counsel. The result of their research has been to show that in the Roman law at least an analogy, if nothing more, is to be found, for I find this in the SECOND INSTITUTE, Title 20, s. 23. The passage in the Latin text can be conveniently found in MOYLE, 5th Edn., p. 299. I am reading the English translation from HUNTER, 3rd Edn., at p. 927 :

> A legacy at a man's option—that is, where the testator had ordered the legatee to choose from among his slaves or other property—involved in itself a condition ; and therefore unless the legatee himself made the choice in his lifetime, he did not transmit the legacy to his heir. But under our constitution this, too, has been remodelled and put on a better footing ; and full leave has been given the legatee's heir to choose, although the legatee has not done so in his lifetime. As greater diligence, too, has been used in handling the matter, this addition has been made in our constitution : if there are several legatees to whom the option is left, and they differ as to the choice of the object, or if one legatee has several heirs, and they differ among themselves about choosing, and one desires to choose one object, another another—then, that the legacy may not be lost (the rule brought in by most of those learned in the law, contrary to all good feeling), fortune is to be judge of the choice, and the case is to be finally settled by lot, so that the opinion of him to whom the lot comes is to prevail in the choice.

If the devise here had been, not " One house to each of my nephews and nieces," followed by the devise of one house to Nellie Hird and one house to another devisee, but " One house to my nephews and nieces as joint tenants or tenants in common," then that passage which I have read from the civil law would afford a clear and precise analogy, and I should have A
no difficulty in saying that, if those nephews and nieces are unable to agree in their choice of the house devised to them, then, in order that the devise may not be lost, fortune is to be the judge of the choice, and the matter is to be determined by lot. I think that I ought to apply the analogy on the same principle here. The clear intention B
of the testatrix is that each of the nephews and nieces should have a house. I think that it is equally clear on the principle of the cases decided in this court that each of those nephews and nieces is to have a choice in priority to those devisees named later in the will. Accordingly, I construe this as a devise of: " A house to each of my C
nephews and nieces, a house to Nellie Hird, and my nephews and nieces are to have a choice before Nellie Hird." How are they to choose? If they cannot agree, then, by the principle of the civil law, the choice must be determined by lot. No case has been brought to my notice in which the contrary has been decided. It could not, I think, be suggested D
that the determination of choice by lot is in any way contrary to *bonos mores*, or that that principle of determination is not one which is well-known. Remembering what a large part of the development of our testamentary law is based upon civil law, I see no difficulty, in these circumstances, in applying that principle of the civil law in the event of the devisees E
being unable to agree. Accordingly, I shall declare that the several devises are valid, and that the right of choice is to go in the first place to the nephew and two nieces as they may agree, and, in the event of disagreement, it may be determined by lot, with liberty to apply in regard to the determination by lot, and then to Nellie Hird, next to Florence F
Knapton, next to the testatrix's sister, and last to her brother. The ordinary rule that they take subject to the mortgages will apply.

Declaration accordingly. Costs of all parties to come out of the estate.

Solicitors: *Long & Gardiner* (for the plaintiff and for all the defendants G
except the first and the last); *Official Solicitor* (for the first defendant); *Treasury Solicitor* (for the last defendant).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

JOHN FOWLER & CO. (LEEDS), LTD. *v.* DUNCAN AND CRABTREE.

[CHANCERY DIVISION (Farwell, J.), **June 17, 1941.**]

Emergency Legislation—Emergency powers—Power to appoint controller of business—Validity of regulation—Powers of controller—Direction to company to increase overdraft at bank—Emergency Powers (Defence) Act, 1939 (*c.* 62), *s.* 1—*Emergency Powers (Defence) Act,* 1940 (*c.* 20), *s.* 1—*Defence (General) Regulations, reg.* 55 (1), (4).

The plaintiff company carried on two forms of manufacture, for each of which they had a separate account with the bank. One of these forms of manufacture was almost wholly connected with the war. The company had encountered certain financial difficulties and a bank had granted them a substantial overdraft, secured by a debenture over the whole of the assets and undertaking, but they were not prepared to make any further advance. Pursuant to the powers given by the Emergency Powers (Defence) Acts, 1939 and 1940, and the Defence (General) Regulations, 1939, reg. 55, the first defendant, the Minister of Supply, appointed the second defendant controller by an order, dated Mar. 21, 1941, which gave the controller very wide powers of managing and controlling the company's business. Friction arose between the controller and the company, and the latter contended that the order which appointed the controller was *ultra vires* the Minister of Supply and that the functions therein specified were not functions of control within the meaning of reg. 55 (4), and, further, that, if this order was not *ultra vires,* the controller had exceeded the powers which he was given :—

HELD : (i) the order was not *ultra vires.* The word " controller " must be construed solely as used in the Act, which enabled the Minister of Supply to give the controller the widest possible powers over the whole and every part of an undertaking.

(ii) the controller had no power to delegate his powers, but he could appoint an assistant, provided that the appointment was confined to rendering assistance and did not extend to the exercise of any of the powers of the controller.

(iii) it was within the powers of the controller to order the company to ignore one of its banking accounts and to operate the other only.

(iv) the controller had exceeded his powers by making the company increase their overdraft. This went beyond controlling their financial operations, and was in fact ordering them to do something out of their own resources which they were unable to do.

[**EDITORIAL NOTE.** In the previous decision in *Jones (Machine Tools), Ltd.* v. *Farrell* (1) it was shown that there was an omission in the drafting of the Emergency Powers (Defence) Act, 1939, s. 1 (2) (*b*) (i). That provision gave power to appoint a controller, but gave no power to authorise the appointed controller to carry on the business of the undertaking. This matter has been remedied by the amendment of the regulations, substituting a modified form of control. These regulations are now held to be *intra vires* and the judgment herein reviews the present position of a controller appointed by the Minister of Supply.

AS TO POWERS OF CONTROLLER, see BUTTERWORTH'S EMERGENCY LEGISLATION, Regulations [13]70(*b*) - 72 (*a*).

Case referred to :

(1) *Jones (E. H.) (Machine Tools), Ltd.* v. *Farrell and Muirsmith,* [1940] 3 All E.R. 608; Digest Supp.

SUMMONS to determine whether an order dated Mar. 21, 1941, and made by the Minister of Supply, was *ultra vires,* and whether the controller appointed thereunder had exceeded his powers. The facts are fully set out in the judgment.

C. E. Harman, K.C., *G. O. Slade* and *M. Bowles* for the plaintiffs.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*, and *H. O. Danckwerts* for the defendants. A

FARWELL, J.: This matter came before the court on a motion by the plaintiff company. With the consent of both parties, they have agreed to treat the motion as the trial of the action. At the request of the Attorney-General the matter was heard by me *in camera*, but there does B not appear to me to be any reason why judgment should not be delivered in open court.

It is not necessary, in the view which I take of this case, to go in very great detail into the various matters which have been discussed before me, nor is it necessary to make any reference to matters which perhaps should C not be mentioned, at any rate, in public. The plaintiff company, John Fowler & Co. (Leeds), Ltd., was incorporated in 1886 for the purpose of taking over a business then existing which was being carried on in partnership. The business of the company at first was the making of various forms of agricultural machinery, and for some years that business D continued. Not long before the war, the plaintiff company undertook the manufacture of certain engines which are saleable both in peacetime and in wartime. Since the war, or at any rate, shortly before the war, they commenced to manufacture certain machines the use of which is mainly, if not wholly, in connection with the war. For the purpose of carrying on E those two different forms of manufacture, which they now carry on, I think, to the exclusion of their original business, they have two accounts with their bank, one account being used for the purpose of financing the manufacture of the engines, and the other being used for the manufacture of the machines. The present chairman of the company, Sir Leonard F Coates, who first became connected with the company by an arrangement made between the bank and the company by which he was given a seat on the board as representing the bank for the purpose of protecting the bank's interest, has now become the chairman of the company, although I think a little unwillingly. The company encountered some difficulties in G connection with the commencement of those two businesses. First, they found a difficulty because they had engaged for a fixed term at a fixed salary a certain manager who proved to be unsatisfactory, and with whose services they found it necessary to dispense. That ultimately proved to be possible only upon payment of a very considerable sum to the person in H question. Their further difficulties were caused by the fact that, in connection with the two forms of manufacture which they now carry on, they needed more money. In order to obtain that, they obtained from their bank a very substantial overdraft, which was secured to the bank by a debenture over the whole of their property, assets and undertaking. However, it is quite plain from the evidence that the extent of that overdraft was the full extent to which the bank were prepared to assist them, and that, in the view of the bank, it would not be a commercial proposition to make further advances on the security of that debenture. That was the position in which the company found itself. The company has contracts for both these different forms of manufacture with different government offices.

Early in 1941, the Minister of Supply, who is the first defendant to this action, thought it necessary to appoint a controller, and, accordingly, by an order dated Mar. 21, 1941, the Minister appointed Charles Henry Crabtree, the second defendant in the action, controller of the undertaking. Acting under the power given by the Act and by the Defence (General) Regulations, 1939, reg. 55, the Minister appointed Crabtree to be controller and directed him to exercise the functions which are set out in the order. Those functions were stated in this way :

> (*a*) Control over the appointment removal and terms of service or employment of all officers servants and agents of the said John Fowler & Co. (Leeds) Ltd. engaged in or in connection with the said undertaking ; (*b*) control over all receipts expenditure and other financial transactions in connection with the said undertaking and over all books accounts and records kept or to be kept and all accounting and preparation of accounts in connection with the said undertaking ; (*c*) control over the entering into determination modification performance and enforcement of contracts in connection with the said undertaking ; (*d*) control over the obtaining of all materials for and the output of the said undertaking ; (*e*) control over the maintenance extension and disposal of all buildings plant and machinery used in connection with the said undertaking ; and (*f*) control over the management and conduct of the said undertaking.

The controller was appointed and that order was made under the powers given to the Minister by the Emergency Powers (Defence) Act, 1939. Sect. 1 (1) of that Act provides as follows :

> Subject to the provisions of this section, His Majesty may by order in council make such regulations (in this Act referred to as defence regulations) as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

Then, without prejudice to those powers, sect. 1 (2) authorises, among other things, the taking of possession or control, on behalf of His Majesty, of any property or undertaking. That is the material subsection under which the appointment was made. I should refer to sect. 1 (3), which provides as follows :

> Defence regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and byelaws for any of the purposes for which such regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in council to be necessary or expedient for the purposes of the regulations.

Subsect. (4) provides as follows :

> A defence regulation, and any order, rule or byelaw duly made in pursuance of such a regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

Then it is necessary to refer to the Defence (General) Regulations, 1939, made under that section in order to see what those regulations are.

Before referring to them, I might say that a question as to the powers of the controller came before Bennett, J., in *Jones (E. H.) (Machine Tools), Ltd.* v. *Farrell and Muirsmith* (1). I do not think that that authority can assist me in dealing with this case, for the regulation to some extent, at any rate, as a result of that decision, has been altered, and I have now to deal with the regulations as they stand. Reg. 55 (1), (4), provides as follows :

> (1) A competent authority, so far as appears to that authority to be necessary in the interests of the defence of the realm or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community, may by order provide . . . (*b*) for regulating the carrying on of any undertaking engaged in essential work, and, in particular, for controlling the charges which may be made by the undertakers in respect of the doing of any work by them ; (*c*) for requiring persons carrying on any undertaking to keep such books, accounts and records relating to the undertaking as may be prescribed by or under the order ; (*d*) for requiring persons carrying on, or employed in connection with, any undertaking, if requested so to do by or on behalf of the competent authority or by or on behalf of any other authority or person specified in the order, to produce to such person, or to a person of such class or description, as may be mentioned in the request such books, accounts or other documents relating to the undertaking or to furnish to him such estimates, returns or information relating to the undertaking as may be mentioned or described in the request ; (*e*) for any incidental and supplementary matters for which the competent authority thinks it expedient for the purposes of the order to provide . . . (4) If it appears to a competent authority that in the interests of the public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, it is necessary to take control on behalf of His Majesty of the whole or any part of an existing undertaking, and that, for the purpose of exercising such control, it is expedient that the undertaking or part should be carried on in pursuance of an order made under this paragraph, the competent authority may by order authorise any person (hereinafter referred to as an authorised controller) to exercise with respect to the undertaking or any part thereof specified in the order, such functions of control on behalf of His Majesty as may be provided by the order ; and so long as an order made under this paragraph is in force with respect to any undertaking or part of an undertaking (*a*) the authorised controller shall exercise his functions in accordance with any instructions given to him by the competent authority, so, however, that he shall not have power to give any directions inconsistent with the provisions of any Act or other instrument determining the functions of the undertakers except in so far as may be specifically provided by the order ; and (*b*) the undertaking or part shall be carried on in accordance with any directions given by the authorised controller in accordance with the provisions of the order, and any person having any functions of management in relation to the undertaking or part shall comply with any such directions.

Reg. 55 (5) provides that amongst other persons who have the power to appoint a controller is the Minister of Supply, and acting under that regulation, or purporting to act under that regulation, the Minister of Supply made the order which I have read. I should add that, so far as I can see, the Act itself does not state specifically what the powers of a controller appointed under the Act are to be, beyond saying that he is to exercise functions of control, words which I do not think carry the matter very much further than the power of appointment of a controller.

The result of appointing the controller in this case has been, according to the evidence before me, to produce very considerable friction between the board of the company and the controller. According to the evidence of the plaintiffs, so great has been that friction that the proper working of the business has been very largely stopped, or, at any rate, it has been considerably hampered. In those circumstances, the company has commenced this action and has moved this motion (i) for the purpose of having decided whether the order of 1941, which I have read, is *ultra vires* the Minister of Supply, and is consequently void, or (ii) for a declaration:

> . . . that none of the functions specified in arts. 1 (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), of the said order is a function of control within the meaning of the Defence (General) Regulations, 1939, reg. 55 (4).

Then they ask—and I think that this is a separate question—even assuming that the order was *intra vires* the Minister, and, therefore, properly made, for a declaration that the controller himself has so exercised, or attempted to exercise, the powers given by the order as to go outside that which he was authorised to do. There appear from the evidence many and various grounds from which the board take the view that the controller is going outside his powers and has taken upon himself considerably more than he was entitled or authorised to do under the order.

Before I come to that, it is necessary, first of all, to consider whether the order itself is in any way *ultra vires* the Minister. The Act itself enables the Minister to appoint a controller, and that controller is to exercise the functions of control. The first question, therefore, is as to the meaning of "control" or "controller" as used in the Act. In my judgment, it does not really assist me to consider what the position of a controller under other Acts of Parliament may have been, or what construction the courts may have put upon the word in other connections and under other Acts of Parliament. I have to consider what the words in this particular Act of Parliament mean. Nor does it seem to me to assist very much, if at all, to consider the powers of a receiver and manager and, as it were, measure up the possible powers of the controller as against those of a receiver and manager. Generally speaking, in my judgment, the word "controller" as used in this Act is a word of a very wide meaning. In my judgment, it enables the Minister of Supply to appoint a person who is to be controller over the whole, and over every part, of the undertaking, if he so chooses. It is not, in my judgment, limited, for instance, as was suggested by the plaintiffs, to the controlling of the policy of the company in relation to contracts or matters of that kind. It seems to me to go far beyond that, and it does enable the Minister to give to a controller appointed by him the widest possible powers over the whole, and over every part, of the undertaking. In my judgment, it is not possible to come to the conclusion, having regard to the nature of the Act and the circumstances, that the order made on Mar. 31, 1941, in any way exceeds the very wide powers which were given to the Minister under the Emergency Powers (Defence) Act, 1939. I think that all the matters which are defined as matters over which the controller is to exercise his functions of control set out in that order come within the power of the Minister. Therefore, so far as the first part of the relief sought by the plaintiffs is concerned, in my judgment they have failed to establish that they are entitled to that, and, so far as the action is one against the Minister of Supply, it seems to me that it must fail.

That, however, by no means finishes the matter, because I have still to consider whether the methods used by the controller have travelled outside the limits of the order. As I have said, there has undoubtedly been very serious friction between the board and the controller. Whose fault that is it is not for me to determine. It may be that the controller has not exercised his powers always in the most tactful manner. It may be that the Minister, having the whole of the matters brought to his notice, may think that the public service would be better effected by appointing some other person to be controller. Again, that is not a matter for me at all. It is a matter for the Minister. It may be that the difficulties have arisen not through the fault of the controller, or not wholly through the fault of the controller, but it may well be a case, as is so common in all these cases, of it being six of one and half-a-dozen of the other, each party hoping to cause friction as a result. That is not a matter for me at all. Those are no doubt considerations which the Minister will have in mind when reviewing the position. However, so far as regards the powers of control which are given to the controller by this order, with one exception I do not think that it has been proved that he has exceeded those powers. I am not proposing to travel through the various matters of which complaint is made in the evidence on behalf of the company, but I desire to mention three matters, in one of which I think the controller has gone further than he was entitled to do. In the first place, complaint has been made that the controller has delegated, or has attempted to delegate, his powers. If the controller had done, or was threatening to do, such a thing as that, he would quite clearly be doing something which was outside his power altogether. Apart altogether from the actual terms of the order, a controller appointed by the Minister is the only person who can exercise the powers of a controller, and it would be quite impossible for him to appoint anyone to exercise those powers on his behalf, or to attempt to delegate those powers to anyone else. Indeed, the Attorney-General did not suggest that there was any such power as that. However, although it may be that some of the letters may have suggested that something approaching delegation was intended, I do not think that there was delegation in fact. In fact, what the controller has done has been to find an assistant to assist him in carrying out his duties, and, so far as that is concerned, and so long as the appointment is confined to an assistant to assist him, and not to exercise any of his powers, I can see no objection to it.

The other two matters which I wish to mention both deal with finance. There has been a considerable complaint made, and I have sympathy with it, that the controller has directed the board to ignore the No. 1 account which was operated on for the engines in question and to operate only on the other account, which was used for the purpose of this particular form of machine. That, as it appears to the company, is a very high-handed action to take. They are naturally anxious to carry on the

first of the two forms of manufacture without any cessation, because they hope that after the war there may be considerable business in that particular form of manufacture, whereas, in the other form of manufacture, business may very largely cease at the termination of the war. Naturally,
A they are very anxious to do all they can to promote the manufacture of the engine, and not to sacrifice that to the manufacture of the machine. Moreover, as they say, they have government contracts for the engines, and they are, of course, most anxious punctually to carry out the various contracts they have. Therefore, they feel that they have been badly
B used by the controller by such an order as that. Whether or not that is really a serious hardship on the company does seem to me to come within the words of para. (*b*) of the order: "Control over . . . financial transactions in connection with the said undertaking." However strong the company's grounds for the objection may be, I am not able myself to come to the
C conclusion that it was outside the powers of the controller to take the particular step he has taken in connection with these two accounts, and, therefore, as far as that is concerned, I cannot assist the plaintiffs.

Finally, a matter on which I do think the controller has gone outside his powers has arisen in this way. The controller thought it necessary,
D and thinks it necessary, I understand, that the company should have control of a larger sum of money to enable it to carry out its contracts, and he has accordingly directed the company to increase its overdraft at the bank in order to provide the necessary money. The company is most unwilling to do that, because, of course, it runs an added risk of the
E bank taking steps to appoint a receiver, or otherwise enforcing their security. However, apart from that altogether, the bank, so far as the company itself is concerned, were not prepared to lend the company any further money. The evidence is plain about that. The amount of the money lent to the company in the past was the limit which the bank
F was prepared to advance, and it was quite impossible for the company to obtain such a loan out of its own resources. As it happened, the bank is willing to make further advances, not because of any extra resources of the company or because of anything which the company itself can do, but because the government is prepared to guarantee the
G bank against the money so advanced. That is a matter entirely for the government. No doubt it may remove the difficulty which the bank would otherwise feel with regard to the company, but it in no way assists the company, which remains the principal debtor for the money so borrowed. Apart from that, however, the question whether the government will
H assist the bank in making advances or will find money in some other way for the purposes of the company is a matter wholly for the government, and not for the controller. That is a matter which is outside the controller's hands, and it seems to me that to give a direction of the sort which he has done, or proposes to do, directing the company to increase its overdraft in a case of this kind, where the company can do nothing of the kind, except because a third party—namely, the government—is

prepared to guarantee the money, is a long way outside the words of the order: "Control over . . . financial transactions in connection with the said undertaking." It is not in fact controlling financial transactions of the company. It is in fact ordering the company to do something which they themselves out of their own resources are wholly unable to do, but which, so far as the bank are concerned, may be rendered possible by reason of the action of an outside party who is not under the control of the controller, and whom the controller in no way controls—namely, the government. If the government think it necessary or desirable to provide money for the company to enable it to carry out its contracts, that is a matter for the government. No doubt they will take such steps as they think right. In my judgment, it is not within the power of the controller to direct the company to undertake a further new liability, a liability which the company itself could not undertake so far as its own resources are concerned, and, in attempting to give such a direction as that, the controller has gone beyond the power which is given him under this order.

In the result, in my judgment, the plaintiffs are entitled to relief in respect of the direction to increase the overdraft of the company with the bank, but no further than that. In the circumstances, I am prepared to make an order that, on the true construction of the order, and in the events which have happened, the controller is not entitled to direct the company to increase its overdraft with the bank, and, if it is desired, the plaintiff company will be entitled to an injunction to the same effect. In my judgment, that is the only relief which I can give the company.

Action against Minister dismissed. Declaration as mentioned against controller. Controller to pay half plaintiffs' costs.

Solicitors: *Maxwell, Batley & Co.*, agents for *Simpson, Curtis & Burrill*, Leeds (for the plaintiffs); *Treasury Solicitor* (for the defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

HILDEBRAND *v.* LEWIS.

[Court of Appeal (MacKinnon, Luxmoore and du Parcq, L.JJ.), **June 17, 18, 1941.**]

Emergency Legislation—Landlord and tenant—War damage—Rent payable in advance—Notice of disclaimer served after rent due—No valid notice to avoid disclaimer—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *ss.* 8, 11, 24.

The appellants owned premises which they let to B., who sublet part of the premises to L., on the terms, *inter alia*, that the rent was to be paid quarterly in advance. B. was in arrear with his rent, and the appellants served a notice on L. under the Law of Distress Amendment Act, 1908, requiring him to pay to them the rent which he would otherwise have paid to B., until the arrears were discharged. In Sept., 1940, the premises were damaged by enemy action, and on Oct. 22, 1940, L. gave notice of disclaimer to B., who did not serve a notice to avoid disclaimer, but on Nov. 21, 1940, the appellants purported to serve such a notice on L. Upon these facts the first point for decision was whether the notice to avoid disclaimer given to L. was good, and upon this it was contended that the appellants were the landlords of L. within the meaning of the Landlord and Tenant (War Damage) Act, 1939, by reason of the definition of landlord in sect. 24. The second point was whether the whole quarter's rent (which was payable in advance) could be recovered, or whether it should be apportioned up to the date of the notice of disclaimer :—

HELD : (i) the notice to avoid disclaimer was invalid, since the landlord, upon the proper construction of the definition in the Act, is the person entitled to receive the rent under the lease, and, in the circumstances of this case, the appellants were not entitled to the rent under the lease to L., but under the provisions of the Law of Distress Amendment Act, 1908.

(ii) the case fell within sect. 8 of the Act of 1939, and not within sect. 11, with the result that the lease was deemed to have been surrendered on the date of the notice of disclaimer, without any special provision as to recovery of rent as contained in sect. 11. The ordinary law applied, and the rent, being payable in advance, was recoverable in full.

Turner v. *Stella Bond, Ltd.* (1) *distinguished.*
Ellis v. *Rowbotham* (2) *applied.*

[**EDITORIAL NOTE**. The Landlord and Tenant (War Damage) Act, 1939, s. 8, states the effect of a notice of disclaimer, whereas sect. 11 states the effect of a notice to avoid disclaimer. In this case, so soon as it was decided that the notice to avoid disclaimer was bad, it was clear that the relevant provisions to be applied were those in sect. 8 and not those in sect. 11. The materiality of this is that, while sect. 11 contains an express provision that " no rent shall be payable by the tenant under the lease in respect of the period beginning with the date of the service of the notice of disclaimer," sect. 8 merely provides that, " as from the date when the notice of disclaimer was served, the lease disclaimed shall be deemed to have been surrendered." The distinction between the provisions is that the former states definitely what is to happen, whereas the latter leaves the ordinary law applicable to a surrender to be applied. The ordinary law in such a case is stated in the judgment of the court, and the point which may have been overlooked in the past is that rent payable in advance is not subject to apportionment. The result, therefore, and it may be thought to be unfair to the tenant, is that, at any rate under sect. 8, the rent payable in advance is payable in full for the whole quarter although the premises may have been rendered unfit quite early in the quarter, or, indeed, as in this case, before the commencement of the quarter.

FOR THE LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939, ss. 8, 11, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 990, 993.]

Cases referred to :

(1) *Turner* v. *Stella Bond, Ltd.*, [1941] 1 All E.R. 449 ; Digest Supp.

(2) *Ellis* v. *Rowbotham*, [1900] 1 Q.B. 740 ; 31 Digest 263, *4042* ; 69 L.J.Q.B. 379 ; 82 L.T. 191.

APPEAL by the plaintiffs from an order of His Honour JUDGE RALPH THOMAS, Mayor's and City of London Court, dated Apr. 4, 1941, and reported [1941] L.J.N.C.C.R. 115. The facts are fully set out in the judgment of LUXMOORE, L.J.

H. Samuels for the appellants.

G. R. Blanco White, K.C., and *H. G. Garland* for the respondent.

Samuels : The present case differs from *Turner* v. *Stella Bond, Ltd.* (1) in that here there was no valid notice to avoid disclaimer. The appellants purported to serve a notice, but the judge held that the notice to avoid disclaimer was invalid. The judge has applied the Landlord and Tenant (War Damage) Act, 1939, s. 11. The present case, however, falls within the terms of s. 8. [Counsel referred to *Ellis* v. *Rowbotham* (2).]

Blanco White, K.C.: If the contention made on behalf of the appellants is correct, where rent is payable in advance and premises are damaged by enemy action before quarter day but notice of disclaimer is not served until after quarter day, the tenant is liable for the whole quarter's rent, and not merely for the rent from quarter day until service of the notice. The lease, however, is deemed to have been surrendered on the terms mentioned in sects. 10 and 11 (1) (*b*). The consequence is that no rent is payable by the tenant after the date of service of notice of disclaimer. Notice of disclaimer was given to the immediate landlord, and also to the superior landlords, who gave a notice to avoid disclaimer. The effect of that would be to stop rent from being payable until the repairs were done. When the superior landlords gave notice to avoid disclaimer, it might be assumed that they were acting as agents of the persons entitled to give that notice. [Counsel referred to *Turner* v. *Stella Bond, Ltd.* (1).]

MacKinnon, L.J.: The judgment of the court will be delivered by Luxmoore, L.J.

Luxmoore, L.J.: The plaintiffs in the action were claiming a sum of £75 10*s*. in respect of a quarter's rent due on Sept. 29, 1940, in respect of a part of the premises known as No. 4, Red Cross Street, in the city of London. The county court judge held that the plaintiffs were entitled to recover only a sum of £22 10*s*., and, as the defendant had paid that sum into court, he gave judgment for the defendant with costs. The plaintiffs, who appeal from that judgment, say that they were entitled to be paid the full £75 10*s*.

The circumstances in which the claim arose are these. The plaintiffs, who were the owners of No. 4, Red Cross Street, granted a lease of it to Brown, who in his turn sublet part of the premises to Lewis. Before the accident which happened to the premises, the position was that Brown had been in arrears with his rent and the plaintiffs served on his subtenant a notice under the Law of Distress Amendment Act, 1908, with the result that Brown's subtenant was liable to pay the plaintiffs the rent, which under his sublease he had covenanted to pay to Brown, until the arrears were discharged, and under the Act the plaintiffs were entitled to give a good discharge on behalf of Brown for the rent. In those circumstances, the premises were very seriously damaged by enemy action in Sept., 1940, and the defendant Lewis, on Oct. 22, 1940, gave a notice of disclaimer to his landlord Brown under the Landlord and Tenant (War Damage) Act, 1939, s. 8. A question arose as to whether the notice of disclaimer had been properly served on Brown, but I think that no question arises now with regard to that, because counsel for the plaintiff has accepted the position that the service of the notice was good. It was delivered to Brown, who acknowledged its receipt. Brown did not give any notice under sect. 11 of the Act to avoid the disclaimer, but on Nov. 21 the plaintiffs purported to give such a notice to Lewis. If that is a good notice to avoid disclaimer, the provisions of sect. 11 will apply. Thus, the question which has first to be determined is whether that is a good notice to avoid disclaimer. If it is not, then, as Brown has served no notice to avoid disclaimer, sect. 8 of the Act takes effect. The plaintiffs, as I have already said, are not the immediate landlords of Lewis. It is said that they are, having regard to the definition in sect. 24 of the Act:

> . . . "landlord" in relation to a lease means the person who under the lease is, as between himself and the tenant, for the time being entitled to the rents and profits of the demised premises payable under the lease . . .

It is said that, because the plaintiffs, by reason of the notice which they had given under the Law of Distress Amendment Act, 1908, were the persons who were entitled for the time being to receive the rents and profits, they were the landlords. It is quite true that they were entitled to receive the rents and profits under that Act, but they were not receiving the rents and profits under the lease. The only person entitled to receive the rents and profits under the lease was Brown. The plaintiffs received the rents and profits, not under the lease, but under the provisions of the Law of Distress Amendment Act, 1908, and there was no sort of relationship of landlord and tenant between the plaintiffs and the defendant Lewis. That being so, it seems to be plain that the notice which they purported to serve upon Lewis to avoid the notice of disclaimer which he had served on Brown was not a good notice to avoid disclaimer, with the result that the notice of disclaimer given by Lewis to Brown remains wholly unaffected. Sect. 8 of the Act provides as follows:

> (1) Where a notice of disclaimer is served, the following provisions of this section shall have effect . . . (2) As from the date when the notice of disclaimer was served, (*a*) the lease disclaimed shall be deemed to have been surrendered . . .

There is no provision in sect. 8 such as is to be found in sects. 10 and 11 with regard to what is to happen to the rent from the date of the notice of disclaimer. The lease is to be deemed to have been surrendered as at the date when the notice was served—namely, Oct. 22, 1940. I look at the lease between Brown and Lewis, and I find that it provides that rent shall be paid by Lewis to Brown quarterly in advance. That is to say, so far as this case is concerned, on Sept. 29, 1940, a quarter's rent became due, and that is the sum which is claimed by the plaintiffs in this action. The judge said that that sum of £75 10*s.* ought to be apportioned as from Sept. 29 to Oct. 22, the date of the notice, and it was for that reason that he decided that the defendant was right in his contention that only £22-odd was payable. It is to be observed that sect. 8, as I have already said, contains no provision with regard to what is to happen to the rent due as from the date of disclaimer or due down to the date of disclaimer. Under sect. 11, if a notice to avoid disclaimer is served in respect of a notice of disclaimer, then no rent is to be payable by the tenant under the lease in respect of the period beginning with the date of the service of notice of disclaimer and ending with the date on which the land is rendered fit. It has been decided in *Turner* v. *Stella Bond, Ltd.* (1) that, in a case where the lease provides that the rent shall be payable in advance, the proper construction of sect. 11 is that, notwithstanding that provision, the rent must be apportioned so as to give effect to the provision that no rent is to be paid in respect of the particular period mentioned. All that sect. 8 provides is that the lease disclaimed shall be deemed to have been surrendered, and it is well-settled law that, where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and, as to the rent previously due, is not affected by the surrender, but the landlord remains a special creditor for the rent due and payable before the surrender. It follows that, if rent becomes due before the date on which the lease is to be deemed to have been surrendered, liability to pay that rent remains. It is also well-settled that, where rent is payable in advance, the Apportionment Act, 1870, does not apply : *Ellis* v. *Rowbotham* (2). The result seems to me to be plain. There can be no apportionment of the rent which fell due on Sept. 29. The lease is to be deemed to have been surrendered on Oct. 22. The liability under the covenant to pay the rent remains. The liability to pay that rent to Brown has been transferred to, and vested in, the plaintiffs by reason of the notice under the Law of Distress Amendment Act, 1908. Consequently, the plaintiffs are entitled to recover that rent and to give a good discharge for it, and it must be the whole of it. The judge in his judgment does not really seem to have dealt with the point under sect. 8 of the Act at all. He seems to have dealt with it as though sect. 11 of the Act was the section applicable. I can see no justification for such a view. Each of the particular circumstances is dealt with in each of the sections, and this case falls under sect. 8, and not under sect. 11, of the Act.

I think that the county court judge was wrong, and that he should have given judgment for the plaintiffs for the full amount claimed. Consequently, the appeal must be allowed and judgment entered for the plaintiffs for the £75 10*s*. claimed. The defendant must pay the costs of this appeal and of the proceedings in the county court. The costs of the proceedings in the county court will be on the county court scale.

MacKinnon, L.J. : I agree.

du Parcq, L.J. : I agree.

Appeal allowed with costs.

Solicitors : *Lieberman, Leigh & Co.* (for the appellants) ; *Aukin & Co.* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re OWERS, PUBLIC TRUSTEE AND ANOTHER *v.* DEATH AND MOUNT VERNON HOSPITAL.

[CHANCERY DIVISION (Simonds, J.), **May 13, 1941.**]

Executors—Liability in respect of leaseholds—Personal liability where possession taken—Indemnity—Setting aside fund to meet contingent liability—Trustee Act, 1925 (*c.* 19), *s.* 26.

The testator at his death was possessed of a number of leasehold properties. His executors entered into possession of these properties, and, by reason of the privity of estate, became personally liable on the covenants, in addition to their liability as executors. The executors asked the court whether they could retain a sum out of the estate by way of indemnity against any liabilities which they might incur in respect of these leases:—

HELD: since the executors were personally liable, the court would, apart from the Trustee Act, 1925, s. 26, order a sum to be set aside as a protection against any liabilities which might arise in respect of these leases.

[**EDITORIAL NOTE.** It was the general view that the Trustee Act, 1925, s. 26, provided a sufficient safeguard to personal representatives in respect of their liability under leases except in the case where they entered into actual possession of the property and became liable by reason of privity of estate. In the latter case, it was thought that they would require the further protection afforded by the retention of a sum to meet any liability to which they were subject. The decision herein confirms this view.

AS TO PROTECTION OF PERSONAL REPRESENTATIVES IN CASE OF LEASEHOLDS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 331, 332, para. 616; and FOR CASES, see DIGEST, Vol. 23, pp. 369, 370, Nos. 4387-4391.]

Cases referred to:

(1) *Re Nixon, Gray* v. *Bell*, [1904] 1 Ch. 638; 24 Digest 608, *6384*; 73 L.J.Ch. 446.

(2) *Re Lewis, Jennings* v. *Hemsley*, [1939] Ch. 232; [1939] 3 All E.R. 269; Digest Supp.; 108 L.J.Ch. 177; 159 L.T. 600.

SUMMONS to determine, *inter alia*, whether the executors were entitled to retain a sum out of the estate of the testator, Ernest Owers, by way of indemnity in respect of certain leases.

Wilfrid M. Hunt for the plaintiffs, the trustees.

H. Wynn Parry, K.C., and *Russell Gilbert* for the Mount Vernon Hospital.

The first defendant did not appear and was not represented.

SIMONDS, J.: This summons comes before me upon the question raised by para. 4 of the originating summons, which is as follows:

> Whether having regard to the personal liabilities or possible personal liabilities of the plaintiffs under or by virtue of the leases vested in the testator at his death and then vesting in the plaintiffs they are at liberty or may properly retain out of the estate a fund by way of indemnity against such liabilities.

The material fact was that, at the date of his death, the testator was possessed of a large number of leasehold properties. There is no question but that his executors entered into possession of those leasehold properties and were thereby, by virtue of the privity of estate, rendered personally liable for the covenants contained in the several leases. I think that it is clear that, apart from the Trustee Act, 1925, s. 26, this is a case where, in accordance with the usual practice, the court would order a sum to be set aside for the protection of the executors against any claims which might be made against them. An executor is liable as an executor—that is to say, as such—but he is also liable personally from privity of estate for the obligations contained in the lease. It is true that there are some limitations upon his liability—notably, he may not be liable for the full rent reserved by the lease, but may be liable only for the letting value of the premises therein comprised—but he is under a personal liability, and, to protect him from that personal liability, the court will decree that a sufficient sum be retained for his protection. The case is put where he is under no personal liability, but is only under a liability as executor. In that case, the court will not decree that a fund is to be set aside for his protection. That is clear from the cases which have been cited, the last of which, I think, was *Re Nixon, Gray* v. *Bell* (1), which I had occasion to review myself recently in *Re Lewis, Jennings* v. *Hemsley* (2). Therefore, this is a case where, apart from the Trustee Act, 1925, s. 26, it would be proper to order that a fund should be set aside for the protection of the executors.

Then it is said that the Trustee Act, 1925, s. 26, is a sufficient safeguard, and that no fund need be set aside. I cannot take that view. Sect. 26 opens with these words:

> (1) Where a personal representative or trustee liable as such for (*a*) any rent, covenant [and so on, satisfies certain conditions, then certain results follow].

It is clear to me, however, that that is intended to deal only with the liability of the executor as such, and it is not intended to deal with the cases where, by reason of the privity of estate, the executor has incurred a double liability—namely, his liability as executor and his personal liability by reason of his entering into possession of the testator's leaseholds. That view, I think, is one which accords with the textbooks. The section which I am now considering adopts, with certain modifications, the provisions of the Law of Property (Amendment) Act, 1859 (Lord St. Leonard's Act), ss. 27, 28, in regard to which it had never been suggested that it covered the personal liability of the executor who had entered into possession of his testator's leaseholds. That view is taken by the textbook writers and I see no reason to doubt the correctness of their view. Accordingly, since the Trustee Act, 1925, s. 26, does not provide sufficient protection for the executors, it is necessary to follow the old practice of the court and to decree that a sufficient indemnity be set aside for their protection. I have not the materials to determine the amount of that protection, and it must be referred back to chambers to ascertain what is a sufficient sum to set aside.

Direction that a sum be set aside and an inquiry held as to the amount. Costs as between solicitor and client costs of the action.

Solicitors: *Merton Jones, Lewsey & Jefferies* (for the plaintiffs); *Vandercom, Stanton & Co.* (for the Mount Vernon Hospital).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

HAZEL *v.* EDWARDS AND ANOTHER.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.JJ.). **May 28, June 10, 20, 1941.**]

Emergency Legislation—Landlord and tenant—War damage—Notice of disclaimer—Premises partly unfit—Premises demised as whole to tenant who sublet in portions—Whether multiple lease—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *ss.* 5 (4), 6, 9, 10, 11, 15, 24.

By a lease, dated July 25, 1922, the respondent demised as a whole, certain premises to the appellants for a period of 21 years from Sept. 29, 1922, with an option for renewal. The appellants sublet the premises in three separate portions. On Sept. 8, 1940, the building was damaged by enemy action, and on Sept. 18 the subtenant of the top floor served a notice of disclaimer upon the appellants. On Sept. 26, the appellants served a notice of disclaimer upon the respondent. On Oct. 11, the subtenant of the first, second and third floors served a notice of disclaimer upon the appellants. On Oct. 17, 1940, the respondent made application to the county court for an order that the notice of disclaimer served by the appellants was of no effect, on the ground that the premises were not unfit by reason of war damage when the notice was served. Alternatively, the respondent alleged that the extent of the war damage did not render it equitable to allow the lease to be wholly disclaimed. On the hearing of the appeal, the court took the point that the whole proceedings were misconceived, in that, as between the parties, the lease could not be regarded as a multiple lease :—

HELD : where premises are let for occupation as a single hereditament, the lease does not become a multiple lease because the tenant elects to let off parts of the premises to subtenants. The words in the definition in the Act of a multiple lease "used or adapted for use as two or more separate tenements" have reference to the use or adaptation at the time of the grant of the lease.

[**EDITORIAL NOTE.** A multiple lease is defined as a lease comprising buildings which are used or adapted for use as two or more separate tenements. The subdivision of premises occurs in almost every conceivable way, from premises consisting of many self-contained parts, which are obviously separate premises in themselves, to rooms separately occupied without any physical separation from the rest of the property, and possibly with the right to use certain parts of the property in common with other subtenants. It is clear that many different sets of circumstances will have to be considered by the courts in deciding whether the lease is a multiple lease within the definition. The Court of Appeal have here decided only one aspect of the question, and they have come to the conclusion that, where the lease demises premises as a whole which are, at the time of the demise, intended to be used as a whole by the tenant, then subletting by the tenant cannot make that lease a multiple lease within the meaning of the definition in the Act. It is pointed out that, in such a case, the subtenant is given protection under sects. 8 and 9 of the Act.

FOR THE LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939, s. 15, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 996.]

Case referred to :

(1) *Boudou* v. *Thornton-Smith*, [1941] 1 All E.R. 454 ; Digest Supp.

APPEAL by the tenants, the respondents in the county court, from an order of His Honour JUDGE ENGELBACH, sitting at the Shoreditch County Court, dated Mar. 7, 1941. The facts are fully set out in the judgment. The argument of counsel became for the most part immaterial, because the court took the point that the proceedings were not rightly brought under sect. 15 of the Act.

Archibald Safford for the appellants.

M. Turner-Samuels for the respondent.

Turner-Samuels: The building in question was let in separate floors to separate subtenants at the time when the Landlord and Tenant (War Damage) Act, 1939, came into operation, and that is the material time to consider in deciding whether or not the lease was a multiple lease.

Goddard, L.J. [delivering the judgment of the court]: By a lease dated July 25, 1922, the respondent to this appeal demised to the appellants the land and buildings thereon known as 14-18, Nile Street, Hoxton, for a term of 21 years from Sept. 29, 1922, at a yearly rent of £1,700, the tenants having the option to renew the lease for a further period of 21 years. The premises demised consisted of a basement and ground floor and four storeys above the ground floor, and were let to the appellants and used by them as a warehouse. In 1935, the appellants sublet the basement and ground floor to one Tipper, whose assignees, the London Tube Co., Ltd., are still in occupation of that part of the premises. In 1936, the first, second and third floors were sublet to Lovell & Christmas, Ltd., who subsequently assigned the sublease to Leicester, Lovell & Co., Ltd. In 1938, the top floor was sublet to one Whiting, and both Leicester, Lovell & Co., Ltd., and Whiting were in occupation under the subleases on Sept. 8, 1940, when the premises sustained war damage. The aggregate of the rents obtained under the subleases was considerably less than that payable under the headlease, which no doubt accounts—in part, at any rate—for some of the difficulties which have arisen in this case, but that is not a matter which can affect the rights of the parties under the Act which we have to consider. As the result of war damage on Sept. 8, the roof and top floor of the premises were wholly destroyed, and considerable damage, including the destruction of the lift, was occasioned to the three floors occupied by Leicester, Lovell & Co., Ltd. On Sept. 26, the appellants served on the respondent a notice of disclaimer of their lease. On Sept. 18, they had received a notice of disclaimer of his sublease from Whiting, but Leicester, Lovell & Co., Ltd., did not serve a notice of disclaimer of their sublease until Oct. 11. On Oct. 17, the respondent made an application to the judge of the Shoreditch County Court under the Landlord and Tenant (War Damage) Act, 1939, s. 15, which deals only with what is called in the Act a multiple lease. In respect of that class of lease, the procedure under sect. 15 is substituted for that under sect. 6, which is the section under which a landlord can apply to the court to determine whether the notice of disclaimer is of no effect on the ground that the premises in respect of which that notice has been served were not unfit by reason of war damage when the notice was served. The other provisions of the Act, excluding those applicable only to ground floors, apply equally to multiple leases and to other leases. In his application, the landlord alleged that the premises were not unfit, or, alternatively, that the extent of the war damage did not render it equitable to allow the lease to be wholly disclaimed. He also made an alternative application under sect. 9 of the Act for the modification of the operation of the notice of disclaimer as the court might deem proper, but, as the court dealt with the application under sect. 15, no question arose in the county court under sect. 9. His Honour heard the application on three occasions, and on Mar. 5 he delivered a full and careful judgment. He divided the lease into two parts, as the section authorises, the disclaimable portion comprising only the top floor, and apportioned the rent between the disclaimable and non-disclaimable portions, and gave certain other directions which it is unnecessary to set out in detail. The main question argued in this court was whether he ought not to have included in the disclaimable portion the part sublet to Leicester, Lovell & Co., Ltd., and disclaimed by them, and, on this, matters of considerable difficulty arose. However, we do not propose in this case to express any opinion upon them, because, although in the county court both sides accepted the position that this was a case of a multiple lease, on appeal, this court took the point as to whether the whole proceedings were not misconceived, in that, as between these parties, the lease could not be regarded as multiple. The definition of a multiple lease in sect. 24 of the Act is as follows:

> . . . a lease comprising buildings which are used or adapted for use as two or more separate tenements.

The question is whether, in the case of a single demise by a landlord to a tenant, and a subdemise by that tenant of portions of the building to separate tenants, that renders the first tenancy a multiple lease. Opinion on this point was expressly reserved by this court in *Boudou* v. *Thornton-Smith* (1), and now has to be decided.

In some cases, no difficulty would arise in deciding the question. If a block of flats or offices, obviously adapted and designed to be let to separate tenants, were let by A to B, clearly that would be a case of a multiple lease. So also, if a tenant applied to his landlord for a licence to convert what had hitherto been one house into a number of flats, the lease would then become a multiple lease within sect. 15. Does the lease of a single hereditament, however, become a multiple lease merely because the tenant, there being no covenant to the contrary in the lease, sublets portions of that which was let to him as a whole? In our opinion, it does not. We think the phrase "used or adapted for use" must have relation to the use or adaptation at the time when the lease was granted. It will be observed that the rights of an occupying subtenant are safeguarded by sect. 8 (2). A sublease by virtue of which any person is entitled to the actual occupation of the land comprised in a disclaimed lease or of any part thereof is unaffected by a notice of disclaimer served on the head landlord by the landlord of the subtenant. From this, it would appear that, if the subletting is valid, not being in violation of any covenant of the head lease, the subtenant can remain, if he wishes, and will become the tenant of the superior landlord. Then, by sect. 9 (1) (*b*), provision is made for safeguarding the interest of any subtenant although he may not be in actual occupation. It is clear, therefore, that it is unnecessary to hold that, for the protection of sub- A tenants' rights, a single lease becomes a multiple lease merely because there has been subletting. In our opinion, where premises are let for occupation as a single hereditament, the lease remains what, for the purpose of convenience, we have called a single lease, though that expression is not found in the Act, and does not become a multiple lease because the B tenant has elected to let off parts of the building to subtenants. It follows that, in the present case, the landlord can either accept the notice of disclaimer or serve a notice to avoid disclaimer. If he adopts the first course, the London Tube Co., Ltd., who are in occupation of the ground floor and basement, will become his tenants, and he can please himself C as to what repairs he does to the remainder of the building. If he decides to serve a notice to avoid disclaimer, he comes under the obligation to repair the whole of the war damage as soon as is reasonably practicable, and, in the case of the top floor, it may well be that it will not be practicable to do the repairs while the war lasts. However, he will have the D rights given to him by the combined effect of sect. 11 (1) (*c*) and sect. 10 (1) (*c*), as soon as he has repaired part, to apply for a rent to be fixed for that part which has been rendered capable of beneficial occupation.

The result is that the appeal is allowed. The order of the court below is set aside, and the application under sect. 15 is dismissed as incompetent. E If the respondent so desires, the matter may be remitted to the county court for his alternative application under sect. 9 to be considered, though it would seem doubtful if, in the circumstances, any useful purpose would be served thereby. If the respondent desires an opportunity of considering whether he will yet serve a notice to avoid disclaimer, F the court will, under sect. 5 (4), extend his time for serving the notice for 21 days from to-day. There will be no costs to either party here or below.

Appeal allowed. Leave to appeal to the House of Lords.

G

Solicitors: *Waller, Neale & Houlston* (for the appellants); *H. C. Morris, Woolsey, Morris & Kennedy* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

RACECOURSE BETTING CONTROL BOARD *v.* BRIGHTON COUNTY BOROUGH RATING AUTHORITY.

[KING'S BENCH DIVISION (Wrottesley, J.), **June 18, 1941.**]

Rates and Rating—Assessment—Basis—Profits basis—Racecourse—Premises used for operating totalisator—Racecourse Betting Act, 1928 (*c.* 41), *ss.* 1, 2, 3 —*Betting and Lotteries Act,* 1934 (*c.* 58), *s.* 18 (1).

By an agreement, dated Apr. 1, 1936, the county borough of Brighton demised certain premises situate on the Brighton racecourse to the Racecourse Betting Control Board to be used for the purpose of working a totalisator until 1956 at a peppercorn rent. It was a term of this agreement that the board should apportion 60 per cent. of the amount retained by them, and applicable to grants, to the racecourse owners, of whom the county borough was one, and the sums so apportioned were to be applied in accordance with any scheme prepared by the board and approved by the Secretary of State for one or more of the following purposes—namely, (i) the general improvement of the racecourse, (ii) the reduction of liabilities for improvements already effected, (iii) the reduction of admission charges or entrance fees or the increase of stake money or for any other purpose specified in the scheme. A dispute having arisen between the parties as to the rateable value of the premises, the matter was referred to arbitration, and the arbitrator valued the premises on the profits basis. The board contended that the profits basis was inapplicable and that the arbitrator should have adopted the contractor's basis :—

HELD : in the circumstances, the only practicable method of determining the rateable value was by reference to the profits basis.

[**EDITORIAL NOTE.** Where a trade or occupation can only be carried on upon a particular hereditament, the usual method of assessing the rateable value by reference to the rent which a hypothetical tenant would pay fails and the valuation of the premises is based upon the actual profits made. In cases where hereditaments are occupied by public authorities for public purposes into which the making of profits does not enter, the valuation has been arrived at on the contractor's basis, that is, a percentage of the capital value of the hereditament. The question here is which of these two methods was to be adopted in the circumstances of this case, the profits and their application being to some degree controlled by the statutory provisions regulating the finances of the board.

AS TO RELEVANCE OF PROFITS IN DETERMINING RATEABLE VALUES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 390, 391, para. 824 ; and FOR CASES, see DIGEST, Vol. 38, pp. 525, 526, Nos. 728-735.]

Cases referred to :

(1) *R.* v. *London & North Western Ry. Co.* (1874), L.R. 9 Q.B. 134 ; 38 Digest 543, *878* ; 29 L.T. 910 ; *sub nom. R.* v. *Bedford Union Assessment Committee & Goldington Parish Overseers,* 43 L.J.M.C. 81.

(2) *Edinburgh Street Tramways Co.* v. *Edinburgh Corpn.,* [1894] A.C. 456 ; 43 Digest 354, *113* ; 63 L.J.Q.B. 769 ; 71 L.T. 301.

(3) *Cartwright* v. *Sculcoates Union,* [1900] A.C. 150 ; 38 Digest 564, *1025* ; 69 L.J.Q.B. 403 ; 82 L.T. 157 ; *on appeal from* [1899] 1 Q.B. 667.

(4) *Port of London Authority* v. *Orsett Union Assessment Committee,* [1920] A.C. 273 ; 38 Digest 563, *1017* ; 89 L.J.K.B. 481 ; 122 L.T. 722.

(5) *Kingston Union* v. *Metropolitan Water Board,* [1926] A.C. 331 ; 38 Digest 547, *901* ; 95 L.J.K.B. 605 ; 134 L.T. 483 ; *affg.* S.C. *sub nom. Metropolitan Water Board* v. *Kingston Union Assessment Committee,* [1925] 2 K.B. 509.

CASE STATED for the opinion of the King's Bench Division of the High Court. The facts are fully set out in the judgment.

W. Craig Henderson, K.C., and *C. Erskine Simes* for the Racecourse Betting Control Board.

A. S. Comyns Carr, K.C., and *Geoffrey Lawrence* for the rating authority.

Wrottesley, J.: By means of an award in the form of a special case the court is asked to say whether the arbitrator was entitled, as a matter of law, to adopt what is commonly called the profits basis in order to arrive at the rateable value of certain hereditaments occupied by the Racecourse Bettting Control Board (which I will refer to as the board) and which are situate on the racecourse owned by the county borough of Brighton. The premises in question are the buildings occupied by the board for the purpose of working the totalisator. The circumstances in which these buildings came into existence appear sufficiently from the special case. Some of them were erected by the board on sites leased by the county borough to the board. One was let by the county borough at a rent representing 5 per cent. or thereabouts of the cost of its erection. One, which formed part of a grandstand, was erected by the county borough, the board having found the sum of £2,000, part of the cost of the erection of the whole building and presumably the proportion of the cost properly attributable to the part used for working the totalisator.

The board was established by the Racecourse Betting Act, 1928, s. 2, which provides, so far as here relevant, as follows:

> (1) For the purposes of this Act there shall be established a Racecourse Betting Control Board (in this Act referred to as the board) which shall consist of a chairman and eleven other members. (2) The board shall be a body corporate and shall have perpetual succession and a common seal, and may acquire and hold such land on or adjacent to a racecourse as may be reasonably required for the purpose of operating a totalisator thereon and such land as may be reasonably required for the offices of the board, and may sell or lease any land held by them which is not required for the aforesaid purposes.

In addition, sect. 1 (2) made it lawful on any approved racecourse, notwithstanding any rule of law or enactment to the contrary, whether in a building or not:

> . . . (*a*) for the Racecourse Betting Control Board and any person authorised by them to set up and keep a totalisator; (*b*) for the board and any person authorised by them to operate, in accordance with the provisions of this Act, and for the purpose of effecting betting transactions on horse races only, a totalisator on days when horse races but no other races take place on the racecourse; (*c*) for any person to effect betting transactions by means of a totalisator lawfully operated . . .

The Betting and Lotteries Act, 1934, s. 18 (1), provides as follows:

> The power of the Racecourse Betting Control Board under the Racecourse Betting Act, 1928, s. 1 (2), to authorise any person to set up and keep, or to operate, a totalisator on an approved racecourse shall be limited to the giving of such authority to the persons having the management of the racecourse, and where such authority is so given, such deductions as the board may, under para. (3) of sect. 3 of the said Act, direct to be made from moneys staked by means of the totalisator shall be paid into the totalisator fund, but the board may pay out of that fund to the persons having the management of the racecourse the amount of the expenses shown to the satisfaction of the board to have been properly incurred by those persons in connection with the setting up, keeping and operation of the totalisator.

The Racecourse Betting Act, 1928, s. 3, provides as follows:

> The Racecourse Betting Control Board (1) may for the purposes of this Act issue (subject to such conditions as they may impose) and at any time revoke certificates of approval in respect of racecourses and ground adjacent thereto; (2) shall make

> it a condition of the grant of a certificate of approval of any racecourse that the persons having the management of such racecourse shall provide a place, whether in a building or not, where bookmakers may carry on their business and to which the public may resort for the purpose of betting, and that the charge to a bookmaker and to any assistant accompanying him, for admission to an enclosure on the racecourse for the purpose of the bookmaker's business shall, in the case of a bookmaker, not exceed five times the amount, and in the case of an assistant not exceed the amount of the highest charge made to members of the public for admission to the enclosure ; (3) shall distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race, after deducting or causing to be deducted such percentage of those moneys as the board may from time to time determine either generally or with respect to any particular racecourse ; (4) shall establish a fund known as the totalisator fund, into which shall be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator, and any other moneys received by the board . . . (6) shall (subject to the payment out of the totalisator fund of all taxes, rates, charges, and working expenses, and to the retention of such sums as they think fit to meet contingencies, and to the payment out of the said fund of such sums as they think fit to charitable purposes) apply the moneys from time to time comprised in the totalisator fund in accordance with a scheme prepared by the board and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse racing.

Accordingly, the board issued a certificate of approval in respect of the county borough's racecourse on condition of the county borough's entry into an agreement under which the board erected the first totalisator building on a site provided by the county borough. Various agreements followed. Finally, by an agreement dated Apr. 1, 1936, which now governs the occupation of all these buildings, the county borough demised all their buildings to the board until 1956 at a peppercorn rent. It is a term of this agreement that the board shall apportion 60 per cent. of the amount coming into their hands and applicable to grants to the racecourse owners, of whom the county borough is one. Under this term the county borough, as the owner of the Brighton Racecourse, will receive substantial sums of money by way of grant from the board. By the terms of the agreement, the county borough is bound to apply these sums to one of the following purposes, set out in cl. 6 (*c*) (ii) of the agreement :

> Any grants which in pursuance of the foregoing provisions are made payable to the racecourse owner shall be applied by it subject to such conditions as the board may decide and in accordance with any scheme prepared by the board and approved by the Secretary of State for one or more of the following purposes as the board may from time to time decide :—(1) in the general improvement of the racecourse ; (2) in the reduction of liabilities for improvements already effected ; (3) in the reduction of admission charges or entrance fees or in the increase of stake money or for any other purpose specified in the scheme.

The liability of the board to apportion 60 per cent. of this amount to the racecourse owners is to remain in force until Dec. 31, 1941, and to continue thereafter unless the board and the Racecourse Association, Ltd., varied the arrangement or determined it by notice.

The principal question for the court, therefore, is whether, in order to arrive at the rateable value of these hereditaments, the arbitrator was at liberty to do what he did, and to base the rateable value on the gross retentions which the board kept back out of the money laid or betted by the persons who made bets through the totalisator, those gross retentions representing, after deduction of the board's expenses in running these totalisators, the profits it made out of them. The contention of the board was, and is, that this was not lawful, and that, in the circumstances, the arbitrator was bound to adopt what is called the contractors' basis—namely, to ascertain the structural value of the buildings and the value of the site, and to apply to those figures, in order to ascertain the rateable value, some such percentage as 5 per cent. for buildings and 4 per cent. for land. The rating authority of the county borough contends that the arbitrator was bound to apply the profits basis, and that, even if this is not the case, at least he was at liberty to apply it. If the arbitrator was at liberty to adopt the profits basis, then his award will be upheld.

The circumstances governing the letting of these hereditaments are such that it is not possible to ascertain in the ordinary way the rent at which the hereditament might reasonably be expected to let from year to year. From the statutory provisions set out above, it appears that no tenant except the board is available. Therefore, comparison and competition are alike excluded. Nevertheless, the rent agreed upon—namely, a peppercorn—is not the rateable value. The board admit this.

By way of a beginning, I have to remember that, by statute, what is to be ascertained is the rent at which the building in question might reasonably be expected to let from year to year, making certain deductions and allowances. This is equally true whether the hereditaments in question are governed by para. (*a*) or para. (*b*) of the Rating and Valuation Act, 1925, s. 22 (1). However violent may be the assumption that these buildings could be let from year to year, nevertheless it has to be made. On the one hand, there is nothing in the Acts governing the matter compelling the board to provide a totalisator on the Brighton Racecourse, nor is there anything compelling them to provide it in a building. Indeed, the Act of 1928, by sect. 1, seems to contemplate the operation of a totalisator in a place which is not a building. On the other hand, the board is encouraged to provide and operate totalisators on racecourses, inasmuch as it is empowered to devote a percentage of the gross takings to paying all working expenses, and any surplus thereafter to purposes conducive to the improvement of breeds of horses or the sport of horse racing. This, coupled with the personnel of the board, is calculated to induce the board to set up and operate totalisators where possible. The agreements in this case, under which totalisators were set up, and which are in common form with those throughout England, illustrate this point.

Quite apart from the statutory directions referred to above, it has been laid down repeatedly that the measure of the rateable value of premises is the rent at which they can be let, and not the profits which can be, or have been, made in them. This is equally true if in fact the circumstances are such, as here, that no such letting as is contemplated by the statutory definition is possible. The valuer, therefore, has to create the market in his imagination, and, if necessary, a market consisting of only one landlord and only one proposed tenant. Into the making of the necessary bargain the question of profit is bound to intrude itself. The racecourse owner cannot be expected to provide either sites or buildings unless he receives from them some remuneration, and he will naturally use his A position as owner of the monopoly of the most convenient land in order to press for as high a rent as possible. The board, for its part, cannot be expected to provide the totalisator unless the rent it pays is such as to leave it a share of profits adequate to the trouble and risks it takes and such as to enable it to forward the objects it is set up to foster. The B board, too, has an absolute monopoly of its powers under the Acts.

The reasoning is not different in principle from that put by BLACKBURN, J., in *R.* v. *London & North Western Ry. Co.* (1), at p. 144 :

> Now there is one principle which is quite clear : in letting a thing from year to year, the rent would be regulated by two matters, on the one hand by the benefit the tenant would be likely to derive from the occupation : because he would not give more than that ; on the other hand, by the nature of the property, such as its C local situation, or how many persons there are who could supply him with an equally eligible thing, and be willing to let it to him : for while he would not be willing to give more than he expected to make by it, he would not even give that if he could get a similar thing at a lower rent. In the case in which we gave judgment the other day, we instanced the case of chambers in one of the Inns of Court. They are let at a higher rent than they would fetch elsewhere because they give facilities to gentlemen to carry on the profession of barristers. And if the Attorney-General could only D get one set of chambers to carry on his business, he would give probably an enormous rent for them ; but it so happens that there are a great many sets of chambers, and the rent the Attorney-General gives is just the same as that given for a similar set by a gentleman only called yesterday. So then, the rent is given because the chambers afford facilities for carrying on the business ; but the rent is not given according to the profits made, and the man who makes nothing gives just as much as the man who is making thousands a year.

E It is, of course, the first part of that passage to which I draw particular attention.

However, the board says that this is not a case where the profits can be earned only on the hereditaments, and on the hereditaments they cannot be earned by any ordinary tenant. That is true, and, if F decisive, the arbitrator had no right to apply the profits basis. It is true that there is nothing to prevent the board, by arrangement with the racecourse owner, from operating a totalisator on the racecourse but not in a building, and it is also true that there is nothing to prevent the board from operating their totalisator on land adjacent to the racecourse, G or from not operating it at all. However, these are elements which appear to me to have an important bearing on the negotiations leading to the bargain. They do not appear to make irrelevant the consideration of the profit to be made in the building. The question of profit would still come into the discussion, though these two arguments would, doubtless, H be used with force by the proposed tenant to limit the demands of the landlord. There is nothing in the case to suggest that the arbitrator put these matters out of his consideration.

Another objection put on behalf of the board is that one should not apply the profits basis except where an inquiry into the profits earned cannot be avoided. If that means that such an inquiry should not be made in the case of premises the yearly value of which can be ascertained by the ordinary method of comparison with other premises, or by the evidence of a letting of the hereditament itself which has taken place under ordinary commercial conditions, I should agree. What happens in the market is the best evidence of the value of the commodities dealt with in the market, and, where the best evidence is at hand, the courts A of law refuse to admit any other. However, at any rate in the case of premises used for making profits, " It is a mistake to suppose that valuation by rental is dissociated from the idea of profit," to use the language of LORD WATSON in *Edinburgh Street Tramways Co.* v. *Edinburgh Corpn.* (2), at p. 475. In the case of premises used only for the purpose of making B a profit, such as the premises in this case, and not capable of being valued by comparison with other similar premises, the proposed tenant and the landlord would alike be thrown back on the question of the amount of possible profits to flow from the occupation.

Then, on behalf of the board, counsel tells me that an examination of C the cases in which the profits principle has been applied discloses that two tests have hitherto been satisfied. First, there must be a monopoly, absolute or local, in the hereditament. Assuming this to be the case—I have not checked it—this case appears to me to pass that test. It is only on the racecourse itself, or on land adjoining, that the board could set up D the local totalisator. Secondly, counsel for the board says it must be a monopoly which the landlord himself could exercise. As to this second test, I cannot see anything in the reasoning which led to the decisions in relation to railways, gas-works, electrical undertakings, tramways, racecourses and railway refreshment rooms, which suggests that this E principle should not be applied, unless the landlord could himself exercise the monopoly. On the contrary, as was said by EARL OF HALSBURY, L.C., in *Cartwright* v. *Sculcoates Union* (3), at p. 673 :

> The problem is to ascertain, according to the statute, what a tenant from year to year might reasonably be expected to give as rent. For the solution of that problem it appears to me that apart from the decisions, as to which I will say a word F presently, all that could reasonably affect the mind of the intending tenant ought to be considered.

It is true that in *Port of London Authority* v. *Orsett Union Assessment Committee* (4) VISCOUNT HALDANE said, at p. 288 :

> . . . the true test is not whether pecuniary profit can be made out of the occupation, but what is its value to the person concerned measured, I think, simply by G what he would be willing to give in order to obtain it.

This, I suppose, is the highwatermark of the argument against the consideration of profits. However, if one cannot measure what the tenant will give except by knowing the profits he is likely to make, then one must consider the profits, and, in so doing, one must apply the true test— H namely, the value to the tenant or person concerned. It is true that this is not a case such as came under consideration in *Kingston Union* v. *Metropolitan Water Board* (5). In this case it is not necessary to apply the profits basis in order to avoid the levying of rates in different rating areas which would amount in all to more than the actual total yearly value of the undertaking, but it does appear to me to be a case where the arbitrator was faced with great difficulty in arriving at the true yearly value of the premises owing to the lack of what I have called an ordinary market. Since he had to arrive at the rent which a tenant would give, and, since it is agreed that the only possible tenant is the board or a person authorised by it, he has not, in my judgment, gone wrong in considering the profits which, I think, both the tenant himself and the landlord would have considered (the tenant before making his offer and the landlord before accepting it) and which would have induced the tenant to offer a rent which would give the landlord some share of those profits by way of rent. At the same time, I am far from deciding that the activities of the board under their Acts are the provision of a public utility. Indeed, I incline to the opposite view. Moreover, I do not have to decide, nor have I decided, that in all cases the only way of arriving at the rateable value of a building containing a totalisator is by applying the profits basis. It is sometimes forgotten, I think, that the application of the profits basis is only a means to an end, the end being to discover the yearly value of a hereditament within the meaning of the statute, so as to ensure that the occupier shall make his fair contribution to the rates levied in any area. To the question whether the arbitrator was at liberty to consider the board's profits, my answer is that he was.

Solicitors: *Sharpe, Pritchard & Co.* (for the Racecourse Betting Control Board); *J. G. Drew*, Town Clerk, Brighton (for the rating authority).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

Re ROBBINS, MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* MELVILLE.

[CHANCERY DIVISION (Simonds, J.), **June 17, 1941.**]

Partnership—Right to profits—Partnership at will—Death of partner—Share of deceased settled—Apportionment—Partnership Act, 1890 (c. 39), *s.* 33 (1).

The testator devised and bequeathed all his property to his trustees, the residue to be held on trust for two beneficiaries. He directed "That rents dividends and other periodical payments in the nature of income current at the date of my death shall not be apportionable but that the same and also all such income accrued but not received at the date of my death shall be treated as income and not as capital." The principal asset of the estate consisted of two freehold theatres, which the testator owned jointly with his brother, and which they carried on and managed as partners, there being no partnership articles, but merely an oral partnership at will. The accounts of the business were made up on Dec. 25 each year, and on Dec. 25, 1936, there were undrawn substantial profits in respect of the period Dec. 25, 1935, to Dec. 25, 1936. The testator died on Feb. 28, 1937. The tenant for life contended that, on the terms of the will, he was entitled to the profits of the business from Dec. 25, 1936, down to the testator's death, and to the undrawn profits accrued on Dec. 25, 1936:—

HELD: (i) the tenant for life was entitled to the profits from Dec. 25, 1936, down to Dec. 25, 1937. The apportionment should be made, not at the testator's death, but at the end of the accounting period, as,

until the end of the period, it was not possible to ascertain the profits.
(ii) the tenant for life was not entitled to undrawn profits accrued prior to Dec. 25, 1936, which must be held to be capital. The direction in the will did not apply to the profits of the partnership, which, by their nature, are not periodical payments in the nature of income.

[**EDITORIAL NOTE.** So far as the question in this case is one of apportionment, A the case proceeds upon well-settled principles, for the most part founded upon the authority of *Browne* v. *Collins* (1). The contention was, however, that, this being a partnership at will, it was dissolved by the death of the testator, and from that time there could be no profits of the partnership, but only moneys accruing to the capital of the estate. The contention is, however, held to be defeated by the fact that the business of the partnership was carried on by the express direction of the testator. B

AS TO RIGHTS OF PERSONAL REPRESENTATIVE OF DECEASED PARTNER, see HALSBURY, Hailsham Edn., Vol. 24, p. 469, para. 897; and FOR CASES, see DIGEST, Vol. 36, pp. 450, 451, Nos. 1156-1162.]

Cases referred to:

(1) *Browne* v. *Collins* (1871), L.R. 12 Eq. 586; 36 Digest 450, *1160*.
(2) *Jones* v. *Ogle* (1872), 8 Ch. App. 192; 20 Digest 282, *412*; 42 L.J. Ch. 334; C 28 L.T. 245.
(3) *Lambert* v. *Lambert* (1874), 29 L.T. 878; 36 Digest 450, *1159*.
(4) *Re Cox's Trusts* (1878), 9 Ch. D.159; 40 Digest 679, *2156*; 47 L.J.Ch. 735.

ADJOURNED SUMMONS to determine the right as between tenant for life and remainderman to certain undrawn profits of a partnership D business, the testator's will containing a clause negativing apportionment. The facts and the provisions of the will are fully stated in the judgment.

Wilfred M. Hunt for the plaintiffs.

Raymond W. Jennings for the first and second defendants.

C. D. Myles for the third, fourth, and fifth defendants. E

The sixth defendant did not appear and was not represented.

SIMONDS, J.: The testator, Walter Emm Melville Robbins, made his will on July 21, 1932. He thereby devised his real estate and bequeathed the residue of his personal estate to his trustees upon trust for sale, F with power to postpone the same at his trustees' discretion and power to retain the same or any part thereof in its present form of investment. He directed his trustees out of the moneys to arise from the sale to pay his funeral and testamentary expenses and debts and legacies, and directed that the trustees should hold the residue of the moneys upon trust for Walter Lloyd Melville and Andrew Melville, who both survived G him. He then directed that the shares of those two named legatees should not vest in them absolutely, but should be held upon certain trusts for their benefit. By cl. 13 of his will he declared as follows:

> All income produced from every part of my residuary estate previously to the sale and conversion thereof shall be applied in the same manner in all respects as if H the same were income from investments hereby authorised.

He further declared:

> That rents dividends and other periodical payments in the nature of income current at the date of my death shall not be apportionable but that the same and also all such income accrued but not received at the date of my death shall be treated as income and not as capital.

Then he gave certain specific directions in regard to any business or undertaking in which he should be interested solely or jointly and with anybody else declaring that the trustees should have all such powers as would be possessed by a single person absolutely entitled :

> . . . as regards the mode and time of realisation of any such business or undertaking or my share or interest therein . . .

Further he declared that the trustees might, if they thought fit and proper :

> . . . continue or concur in continuing any such business or undertaking over such period and upon such terms in all respects as they shall think fit with power to enter into any new arrangement or agreement with any person or persons with whom at my death I may have been carrying on any such business or undertaking either in partnership or otherwise as my trustees shall consider desirable and to retain or employ in any such business or undertaking such part of my residuary estate (whether in excess of my capital or share of capital engaged therein at my death or not) as my trustees may from time to time think proper.

The testator died on Feb. 28, 1937, and probate of his will was granted on May 20, 1937. At the date of his death, he was carrying on certain theatrical enterprises in partnership with his brother. There was no written partnership agreement, but an oral agreement only, and it was a partnership at will. Questions have arisen as between the persons entitled in succession to his residuary estate in regard to the profits of that business both before and after the death of the testator.

The facts are conveniently stated in an affidavit of George Edward Baldry, the general manager of the Midland Bank Executor and Trustee Co., Ltd., one of the executors and trustees of the will. He says that the testator at his death was the joint owner in equal shares with his brother, Frederick Emm Melville Robbins :

> . . . of two freehold theatres in the West End of London known as the Lyceum and Princes. The testator's interest in such theatres constituted the principal asset of his estate. The testator and his said brother managed and carried on such theatres as partners in equal shares, there being no partnership articles but merely an oral partnership at will. After the testator's death his executors continued with the testator's said brother and since his death on Apr. 5, 1938, with the brother's executors, the said partnership business upon the same terms as before, pursuant to the power in that behalf conferred upon them by cl. 14 of the said will. During the lifetime of the testator and his said brother Frederick they drew only a small part of their shares of the profits of the said business and the rest of such profits were left by them in the said business and appear in the accounts thereof as moneys standing to the capital account of the respective partners.

Then he says this, which is of considerable importance in the consideration of this question :

> The accounts of the said business were and are made up to Dec. 25 each year.

That is, therefore, the conventional period in which the profits or losses of the partnership are ascertained. The deponent continues as follows :

> The accounts of the said business from Dec. 26, 1936, showing the interest of the testator and his executors in the said business [are exhibited]. As appears therefrom, there was standing to the credit of the testator as capital in the Lyceum and Princes Theatres' accounts respectively at Dec. 25, 1936, sums of £1,051 8*s.* 4*d.* and £1,237 4*s.* 5*d.*, respectively, which sums in fact represent undrawn profits of the testator.

I interpose at this stage the further fact, which is stated in a later affidavit, that all those undrawn profits were profits for the period from Dec. 26, 1935, to Dec. 25, 1936. The deponent then continues as follows :

> As further appears therefrom, the testator's half-share of profits of the Lyceum and Princes Theatres respectively from Dec. 26, 1936, to Feb. 28, 1937, amounted

to the sums of £7,504 2*s.* 8*d.* and £1,401 15*s.* 9*d.* respectively.

With the assistance of the accountants the deponent there has given those figures as being the profits for the broken period from Dec. 26, 1936, to Feb. 28, 1937. The question which has been raised is in regard both to the profits over that broken period, as I have called it, and to the A profits for the period before the death of the testator, in regard to both of which periods the tenant for life claims that he is entitled to the profits. For the period up to Dec. 25, 1936, he founds himself solely on the language of the will, but, for the period from Dec. 26, 1936, to the death of the testator, he founds himself, not only upon the language of the will, B but also upon the general principle of law, for which he relies upon such cases as *Browne* v. *Collins* (1).

I will deal first of all with the period from Dec. 26, 1936. The general law is conveniently stated in GOVER, CAPITAL AND INCOME, 3rd. Edn., p. 30. The author is dealing with the Apportionment Act, 1870, and C he says, at p. 30:

> Profits of a private business or partnership are not apportionable under the Act (*Jones* v. *Ogle* (2)), but must be taken as having accrued entirely at the end of the period for which they are declared, and not before.

For that he relies upon *Browne* v. *Collins* (1) and *Lambert* v. *Lambert* (3). The paragraph continues:

> D And if the life tenant dies before the expiration of that period, they belong to the next life tenant or remainderman then in possession.

He cites *Re Cox's Trusts* (4) for that, and continues as follows:

> Delay in ascertaining the profits does not affect the rights of the parties interested (*Browne* v. *Collins* (1)); but where the partners have power to capitalise profits, there may be a question whether the omission to divide the profits is due to an intention to capitalise.

E As I have pointed out, the executors, availing themselves of the power given by the will, continued to carry on the business which their testator had theretofore carried on in partnership with his brother. So carrying it on, the accounting period was a period which ran from Dec. 26 in one year to Dec. 25 in the following year. Accordingly, the accounting F period with which I am primarily concerned on this part of the case was the period from Dec. 26, 1936, to Dec. 25, 1937, which embraced two months or so of the testator's life and a period of ten months after his death. It appears to me that, applying the principle stated in the textbook which I have read, the line must be drawn, not at the death G of the testator, as the accountants have drawn it, but at the end of the accounting period, for it is then, and then only, that it can be discovered whether the business made a profit for the relevant period. Therefore, I do not propose to declare that the tenant for life became entitled to the profits somewhat arbitrarily ascertained for the period H from Dec. 26, 1936, to Feb. 28, 1937, but that he was entitled to the whole of the profits for the period from Dec. 26, 1936, to Dec. 25, 1937.

It is suggested that in this case that is not a proper principle to apply, because here the partnership was a partnership at will, carried on under an oral agreement, so that automatically it became dissolved under the Partnership Act, 1890, by the death of the testator, and, accordingly, there was no room for saying that anything which had in fact accrued by way of profits down to the testator's death could be regarded as a profit, but must be treated as part of the capital of the estate. I do not think that that is the correct way of looking at the situation where in fact the business is carried on under the direction of the testator, so that there is one continuous period wherein the business is carried on first by the testator and then by the executors under his directions. It seems to me proper in such a case to apply the principle which I have stated, and to treat the whole of the income for the conventional period as belonging to the person who is living at the expiration of that period. In coming to that conclusion, I do not rely in the least upon the terms of the will, but for the period before the testator's death—namely, for the conventional period which expired on Dec. 26, 1936—there can be no doubt, upon general principles, that the profits undrawn for that period are capital of the testator's estate, unless there is something in his will which provides for a different destination.

I therefore turn again to the terms of the will, in order to see whether there is anything which will affect the position. Counsel for the tenant for life has founded his argument on a passage in cl. 13 which I have read :

> . . . rents dividends and other periodical payments in the nature of income current at the date of my death shall not be apportionable but . . . the same and also all such income accrued but not received at the date of my death shall be treated as income and not as capital.

Counsel says that the profits which accrued prior to Dec. 26, 1936, and which were subsequently ascertained, but which had not been received by the testator at the date of his death, fall within that declaration. I think that it is quite clear that, unless there is some special context, the words which I have read are not apt to carry the profits of a partnership. That, indeed, is stated in the passage in GOVER, CAPITAL AND INCOME, 3rd Edn., p. 30, which I have already read, and is clear on the authority of *Jones* v. *Ogle* (2), the case there cited. If that is so, this clause cannot assist the tenant for life, unless there is some special context which enables me to give the words some special meaning. However, here again I can find nothing—and in particular I can find nothing in the succeeding clause, in which he does deal with any business or undertaking in which he might be interested—which would justify me in saying that, when the testator uses these words, he intends them to cover the profits of the partnership which, by their nature, are not periodical payments in the nature of income. Accordingly, I must decide against the claim of the tenant for life, so far as it relates to the profits which had accrued and were subsequently ascertained and carried to his account for the period ending Dec. 25, 1937.

Declaration accordingly. Costs as between solicitor and client out of the estate.

Solicitors : *Thomas Eggar & Son*, agents for *Nye and Donne*, Brighton (for the plaintiffs) ; *Janson, Cobb, Pearson & Co.* (for all the defendants except the sixth).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

SECRETARY OF STATE *v.* SARDAR RUSTAM KHAN AND OTHERS.

[Privy Council (Lord Atkin, Lord Russell of Killowen, Lord Romer, Sir George Rankin and Clauson, L.J.), **March 18, April 28, 1941.**]

Privy Council—India—Public authorities—Acts of state—Cession of territory—Title to land—Right of government to refuse to recognise prior title—Recourse to municipal courts.

By an agreement dated May 14, 1903, between His Highness the Khan of Kalat and the Government of India, the former ceded to the latter in perpetuity his sovereign rights of the Nasirabad Niabat absolutely in consideration of an annual rent of 115,000 rupees. This agreement amounted to a perpetual lease of the territory at a quit rent. The respondents claimed under a grant from a predecessor of the Khan certain lands within this territory, which the Indian Government after the execution of the agreement—which was in fact a treaty—had taken over as unoccupied land :—

Held : the Government of India, after the cession of the territory to it, had the right to recognise or not to recognise existing titles to land in the territory and, in cases where that Government refused to recognise such a title, those claiming title had no recourse to municipal courts.

[**EDITORIAL NOTE.** In countries acquired by cession and which, at the time of their acquisition, had already laws of their own, the Crown has power to alter or change these laws, but, until this is done, the ancient law remains in force. In the case of title to land, however, the Crown can either recognise the title under prior rulers or, if it so chooses, refuse to recognise that title and treat the land as government property, and persons asserting a prior right cannot enforce that right in the courts of the country acquired.

As to Conquered and Ceded Countries, see HALSBURY, Hailsham Edn., Vol. 26, pp. 255, 256, para. 569 ; and for Cases, see DIGEST, Vol. 38, pp. 9-13, Nos. 26-66.]

Cases referred to :

(1) *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1859), 7 Moo. Ind. App. 476 ; 13 Moo. P.C.C. 22 ; 38 Digest 8, *17*.

(2) *Cook* v. *Sprigg*, [1899] A.C. 572 ; 38 Digest 13, *67* ; 68 L.J.P.C. 144 ; 81 L.T. 281.

(3) *Secretary of State for India* v. *Kamachee Bai Rajbai* (1915), 42 Ind. App. 229.

(4) *Vajesingji Joravarsingji* v. *Secretary of State for India* (1924), L.R. 51 Ind. App. 357 ; Digest Supp.

(5) *Dattatraya Krishna Rao Kane* v. *Secretary of State for India* (1930), 57 L.R. Ind. App. 318 ; Digest Supp.

Appeal by the Secretary of State by special leave from a judgment of the Additional Judicial Commissioner in Baluchistan, in which in the respondents' suit he made a decree declaring their title to, and granting them possession of, the lands in suit. The facts are fully set out in the judgment of their Lordships delivered by Lord Atkin.

J. M. Tucker, K.C., and *J. M. Pringle* for the appellant.

Robert Gibson, K.C., *Sir Hari Singh Gour* and *S. P. Khambatta* for the respondents.

Lord Atkin : This appeal raises an important question as to the powers of the British Government over the subdivision of Nasirabad, part of the territory of the Khan of Kalat under a document dated Feb. 17, 1903, purporting to be an agreement made between the Khan of Kalat and Colonel Yate, agent to the Governor-General in Baluchistan. The agreement was expressed to be subject to the confirmation of the Viceroy and Governor-General in Council, and was duly confirmed on May 14, 1903. The circumstances in which the agreement was made appear to be that for many years part of this district had been irrigated by canals flowing from the Indus, and that arrangements had been made between the Khan and the British Government by which occupiers of land benefited were made subject to a water tax, assessed by British officials and collected by Kalat officials, of which the proceeds were divided equally between the two governments. This species of dual control naturally proved irksome, and the remedy was found in the agreement in question, styled, without prejudice to its accurate description in law, the treaty of 1903. It is in the following terms :

> Agreement entered into by His Highness the Khan of Kalat, Mir Mahmud Khan, G.C.I.E., of the one part, and by the Honourable Colonel C. E. Yate, C.S.I., C.M.G., Agent to the Governor-General in Baluchistan, of the other part, subject to the confirmation of His Excellency the Viceroy and Governor-General in Council.
>
> Executed at Sibi on Feb. 17, 1903.
>
> I. Whereas it has been found by experience to be to the advantage of both the British Government and His Highness Beglar Begi Mir Mahmud Khan, G.C.I.E., Khan of Kalat, that the Niabat of Nasirabad should be exclusively managed by the officers of the British Government, it is hereby declared and agreed as follows :—
>
> His Highness Mir Mahmud Khan, Khan of Kalat, on behalf of himself and his heirs and successors, hereby makes over and cedes in perpetuity to the British Government the entire management of the Nasirabad Niabat absolutely and with all the rights and privileges, state or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other powers of administration, including all rights to levy dues and tolls on the following conditions :—
>
> (1) That the said Niabat shall be administered, on behalf of the British Government, by or through such officer or officers as the Governor-General in Council may appoint for the purpose with effect from Apr. 1, 1903, or such subsequent date as the government of India may take it over.
>
> (2) That the British Government shall pay to His Highness on Apr. 1, 1904, and thereafter, annually, on Apr. 1 each year, fixed annual rent of Rs.1,15,000.
>
> (3) That the aforesaid sum of Rs.1,15,000 shall be paid to His Highness without any deduction of cost of administration.
>
> II. The boundary of the Nasirabad Niabat as described by His Highness the Khan of Kalat's Naib, Ghaus Bakhsh in July, 1902, is as follows :—
>
> On the south the Sind border, on the north, commencing eastwards at the Leni Burj, it runs north-eastwards along the Mazari border to the Bugti Hills. It follows the foot of these hills running in a westerly direction to their nearest point to the Shahpur Road near the Manak Garhi Nulla. It then follows this nulla as far as the Shahpur Road, then follows the Shahpur Road south as far as the Deh Chattan lands (generally known as Dodaika) and then turns west following the boundary of Dodaika to the Nurwah Channel above the point to where the water reaches. It then follows the Nurwah as far as the junction of the latter with the Dur Mohammad Wah, which is shown on most maps as the Shahiwah, a continuation of the main desert canal. From this point it follows the Dur Mohammad Wah right along its course to the west and south-west crossing the railway at mile 368, five miles north of Jhatpat station, until it meets the line of pillars erected about 4 years ago by the Magassis and Jamalis as their mutual boundary. It then follows this line of pillars southwards to the Sind border, passing about 500 yards to the west of the point where the Sonwah has been closed.
>
> III. Whereas it is possible that the lower portion of the Manjuti lands enclosed by a straight line drawn from the place where the Dur Mohammad Wah crosses the railway, near mile 368, to a point on the Jacobabad-Shaphur Road, 8 miles to the north of where the Dur Mohammad Wah crosses that road may hereafter be brought under irrigation, His Highness the Khan of Kalat hereby agrees, on behalf of himself, his heirs and successors, to make over and cede to the British Government in perpetuity that portion of the Manjuti land in the same manner as the Nasirabad Niabat above referred to, and it is hereby agreed that the British Government shall pay to His

> Highness annually an additional rent of Rs. 2,500 making a total quit rent of Rs. 1,17,500 to be paid on Apr. 1, 1904, and subsequent years.
>
> IV. And whereas it is advisable that any further Kalat State lands outside the present boundary of the Nasirabad Niabat, which may hereafter possibly be brought under irrigation by branches and extensions from existing British canals should also come under British administration in the same manner as the Nasirabad Niabat above referred to, His Highness agrees to make over on lease in perpetuity any lands in the Lehri Bhag and Gandawa Niabats that may hereafter be found to be irrigible from existing British canals at a fair quit rent which can be determined when the surveys have been completed.
>
> Mir Mahmud Khan
> Chas. E. Yate, Colonel,
> Agent to the Governor-General in Baluchistan.
> Curzon
> Viceroy and Governor-General of India.
>
> This agreement was ratified by His Excellency the Viceroy and Governor-General of India at Simla on Thursday, May 14, 1903.
>
> Louis W. Dane,
> Secretary to the government of India in the Foreign Department.

Over part of the land comprised in the agreement the predecessors of the plaintiffs held proprietorial rights granted to them by the then Khan of Kalat. For the purposes of this case, it may be assumed that the grants continued to be of full force up to the date of the agreement. After the agreement had been made, the Government of India decided that there should be a settlement of the territory on the lines of the settlement in Sind. Smart, a civil servant with experience of Sind, was appointed, and began work in Oct., 1905, which he completed in Apr., 1907. The principles to be adopted in determining what existing titles, if any, were to be recognised in the settlement were decided from time to time in the course of the work. The district was treated as divided into two sections, the eastern and the western, the former being better irrigated and more cultivated than the western, in which the lands in suit are situate. This section has an area of about 372,000 acres, of which a large part was waste and uncultivated. In Oct., 1906, there was a conference between the agent to the Governor-General and the Revenue Commissioners in Baluchistan and Smart, in which decisions were made which were carried out in the settlement record, and in respect of which the present dispute arises. It will be convenient to set out in the words of Smart in his settlement report the principles upon which the settlement proceeded :

> 3. The method of inquiry pursued in the preparation of the settlement records has been the same for the eastern and western sections with one exception. In the eastern section it was considered necessary to make detailed enquiries into all cases where possession of land had been acquired by a doubtful title.
>
> The principle which was adopted was as follows :—
>
> Wherever figures of cultivation for the last 12 years showed that an occupant had cultivated one-third of the holdings he claimed, no inquiry into title was to be made. Inquiries into title were made wherever this condition was not fulfilled, provided the claim of the occupant had not been established by some previous decisions of competent authority. The principle followed involved a great deal of trouble, and the nature of evidence to be collected was often extremely complicated.
>
> In the western section, owing to the existence of old Sanads from His Highness, the Khan of Kalat, it was decided in a note of the conference held on Oct. 5, 1906, between the honourable the agent to the Governor-General, Revenue Commissioner, and myself that the following principles should be employed. The total irrigible lands were to be divided in three classes. " A " lands already irrigated and cultivated

> (allowing for fallow years) were to be entered in the names of present occupants, provided they showed reasonable title, *e.g.*, continued possession for 12 years. "B" lands commanded by existing canals or Zemindari water-courses therefrom, which are in use but not irrigated owing to scarcity of water, were to be entered in the name of claimants showing the best title, on condition that the Sind Fallow Rules will apply to them from the Kharif Season of 1907; a notice was to be served to such claimants informing them that they would be liable to pay assessment in the fifth year, whether they had cultivated the land or not, provided they had not paid assessment once in the past four years.
>
> "C" land which is entirely waste or "Pat" was to be entered as government unoccupied lands.
>
> These principles have been followed in the settlement of the western section. The method employed in the work of settlement is otherwise the same for both sections.

The area of the "C" lands thus entered as government unoccupied lands extended to about 141,000 acres. The present suit is concerned with all the lands over which the plaintiffs held rights granted by the Khan of Kalat, but the controversy was particularly directed to the "C" lands, the plaintiffs claiming that, as they were comprised in their grant from the Khan, the Government have no title to them. The answer of the Government is that the treaty of 1903 gave them full sovereign rights over the territory, and that, if they decided to ignore the rights of previous holders and to substitute as owners either themselves or anyone else, no one had a right to complain in a municipal court. The acts of the Government in making the treaty and in exercising its powers under it were acts of state, for which the Government could not be impleaded.

It is necessary, therefore, to refer to the treaty to see what its juristic effect was. According to the plaintiffs, it was merely what their counsel styled a commercial contract, intended only to effect a more convenient method of collecting revenue, and granting powers only for that object. Their Lordships cannot take this view. It is opposed to the plain wording of the document, and to the obvious construction when the treaty is regarded as a whole. The words "cedes in perpetuity the entire management of the Nasirabad Niabat absolutely and with all the rights and privileges, state or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other forms of administration" are words creating rights between two sovereign states which were never yet found in any mere commercial agreement. It is true the right ceded is the entire "management," and the consideration is an annual rent, and, as is made clearer in para. IV of the treaty, the transaction is in fact a perpetual lease of the territory at a quit rent. Nevertheless, the sovereign of Kalat made over to the British state the whole of his sovereign rights, though, as the cession takes the form of a lease, the territory does not pass so as to become part of the British Dominions, but still rely, if necessary, upon the Foreign Jurisdiction Act, 1890, s. 1, which remains Kalat territory. The Government, therefore, are entitled to provides as follows:

> It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

Sect. 16 provides as follows :

> In this Act, the expression " foreign country " means any country or place out of Her Majesty's dominions . . . The expression " jurisdiction " includes power.

It is perhaps unnecessary to say that the statute does not increase the powers given to His Majesty in the foreign country. It is the power given, and no other, which may be exercised as if acquired by conquest or cession. In the present case, the powers given are " all the rights and privileges, state or personal." It is plain that these rights and privileges are to be exercised in as ample a manner as if acquired by conquest or cession. On the legal position which arises in such circumstances there is a wealth of weighty authority. In *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1), the East India Co., who in 1855 had entered into treaties with the Rajah of Tanjore not dissimilar from the treaty in the present case, had seized the whole Raj of Tanjore on the death of the last Rajah without leaving issue male. It was held that the East India Co. were possessed of sovereign powers, that they had exercised these powers, not under colour of law, but as acts of state, and that they and their successors could not be impleaded in any municipal court for what was so done. In the judgment of the Judicial Committee, delivered by LORD KINGSDOWN, occur the following words, at p. 540 :

> The result, in their Lordships' opinion, is that the property now claimed by the respondent has been seized by the British Government, acting as a sovereign power, through its delegate the East India Company ; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act, neither the court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy.

In *Cook* v. *Sprigg* (2), the plaintiffs claimed to be grantees of concessions made to them by the paramount chief of Pondoland before the annexation of Pondoland by the British Government. LORD HALSBURY, L.C., in the judgment of the Judicial Committee, said, at p. 578 :

> It is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.

In *Secretary of State for India* v. *Rajbai* (3), the circumstances were that in 1817 the Gaekwar had ceded the district of Ahmedabad to the British Government. In 1898, claims were made by the plaintiffs against the Government, asserting permanent rights to lands within the district existing before the cession. The Judicial Committee came to the conclusion that the question entirely depended upon the extent to which the British Government had recognised pre-cession rights, and said, at p. 237 :

> The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them are, save in one respect, entirely irrelevant matters. They could not carry on under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have against their new sovereign were those, and only those, which that new sovereign, by agreement, express or implied or by legislation, chose to confer upon them.

A Their Lordships will conclude this review of authorities with the words of LORD DUNEDIN in giving the judgment of the Board in *Vajesingji Joravarsingji* v. *Secretary of State for India* (4). In that case, territory in Gwalior had been ceded to the British Government by the Maharajah Scindia by a treaty which expressly provided that each government B should respect the conditions of existing leases. The appellants had brought a suit for a declaration that they were pre-cession proprietors of the lands in question, and LORD DUNEDIN said, at p. 360:

> A summary of the matter is this: When a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it C may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts. The D right to enforce remains only with the high contracting parties.

These decisions were again adopted by the Board in *Dattatraya Krishna Rao Kane* v. *Secretary of State for India* (5), where they were applied to a claim to enforce pre-cession rights in territory leased in perpetuity by His Highness the Nizam to the British Government in 1902. It follows, E therefore, that in this case the Government of India had the right to recognise or not to recognise the existing titles to land. In the case of the lands in suit, they decided not to recognise them, and it follows that the plaintiffs have no recourse against the Government in the municipal courts. An explanation for the Government action was given at one time F that the plaintiffs were in breach of their conditions of tenure to the Khan of Kalat. Whether this be true or not is clearly irrelevant, in view of the established law regulating the position of the Government as against former proprietors. Neither it nor any action of government officials indicates any intention on the part of the Government to recognise this G existing title in these lands. On the contrary, the decision made in Oct., 1906, by the high officials, together with Smart, that the plaintiffs were only to be given inalienable occupancy rights over some of the lands, while the "C" lands were to be entered as government lands, indicates conclusively what the intention of the Government was, and it only H needed the confirmation of the report by the Government of India, which was signified on Apr. 1, 1908, to conclude the matter.

In accordance with these authorities, their Lordships have not considered whether the decision was just or unjust, politic or impolitic, and it must not be considered that they have had any material placed before them to indicate that it was, in the circumstances, either unjust or impolitic. Their Lordships will humbly advise His Majesty that this appeal should be allowed and the respondents' suit dismissed with costs. The respondents must pay the costs of this appeal.

Appeal allowed with costs.

Solicitors : *Solicitor, India Office* (for the appellant) ; *Hy. S. L. Polak & Co.* (for the respondents).

[*Reported by* Hubert B. Figg, Esq., *Barrister-at-Law.*]

LIVERSIDGE *v.* ANDERSON AND MORRISON.

[Court of Appeal (MacKinnon, Luxmoore and du Parcq, L.JJ.), **June 20, 1941.**]

Emergency Legislation—Imprisonment under defence regulation—Person of hostile associations—Onus of proof—Claim for false imprisonment—Defence (General) Regulations, reg. 18B.

The plaintiff who had been detained in prison under the Defence (General) Regulations, reg. 18B (which provided for the detention of persons of hostile associations) claimed a declaration that his detention was unlawful and damages for false imprisonment. The defendants in their defence admitted that the first defendant ordered the detention under the regulation. The plaintiff thereupon asked for particulars of the grounds upon which the first defendant had reason to believe the plaintiff to be a person of hostile associations, and of the grounds on which the first defendant had reasonable cause to believe that, by reason of such associations, it was necessary to exercise control over the plaintiff. These were the matters which arise under reg. 18B :—

Held : such particulars could only be ordered if the onus was upon the defendants to prove the various facts which justified the making of the order for detention. The onus was not on the defendants to prove these matters and no order for particulars ought to be made.

[**EDITORIAL NOTE.** It is well-settled that, upon an application for a writ of *habeas corpus* in circumstances such as these, it is sufficient for the Minister concerned to state his honest belief that there were reasonable grounds for the detention. It is here suggested that in an action for false imprisonment, the plaintiff having proved the detention, the defendant would then have to prove facts which afforded reasonable grounds for the detention. The court have held, however, that this is not so. The onus is on the plaintiff to adduce *prima facie* evidence of the invalidity of the order.

For the Law on the Subject, see HALSBURY, Hailsham Edn., Vol. 6, p. 533, para. 662 ; and for Cases, see DIGEST, Vol. 11, p. 552, Nos. 538-543.]

Cases referred to :

(1) *Weinberger* v. *Inglis*, [1918] 1 Ch. 133 ; Digest, Pleading, 200, *1684* ; 87 L.J.Ch. 148 ; 118 L.T. 208.

(2) *Green* v. *Garbutt* (1912), 28 T.L.R. 575 ; Digest, Pleading, 200, *1680.*

(3) *Alman* v. *Oppert*, [1901] 2 K.B. 576 ; Digest, Pleading, 198, *1663* ; 70 L.J.K.B. 745 ; 84 L.T. 828.

(4) *R.* v. *Home Secretary, Ex p. Lees*, [1941] 1 K.B. 72 ; Digest Supp.

Appeal by the plaintiff from an order of Tucker, J., dated May 23, 1941. The facts are fully set out in the judgment of the court delivered by MacKinnon, L.J.

G. O. Slade for the appellant.

Valentine Holmes for the respondents.

Slade : It is sufficient for the plaintiff to aver the imprisonment. It devolves upon the defendants to justify that imprisonment. The defendants can either deny the detention or they can admit and justify it. The power to make an order under reg. 18B arises only if there is a reasonable ground of belief. As regards the particulars asked for, I am entitled to know if the defendants are going to make it part of their defence that they had reasonable grounds of belief. This is clearly a case in which the plaintiff is entitled to particulars. There is no reasonable ground for believing the plaintiff to be a person of hostile associations. [Counsel referred to *Weinberger* v. *Inglis* (1), *Green* v. *Garbutt* (2), *Alman* v. *Oppert* (3) and *R.* v. *Home Secretary, Ex p. Lees* (4).]

Holmes : Para. 3 of the defence does not purport to admit something which is not pleaded. The plaintiff says that the order is expressed to be made under reg. 18B, and, having regard to the maxim *omnia acta rite esse praesumuntur*, it means that he has so pleaded. It is quite clear from the terms of reg. 18B that it is not for the Home Secretary to be ordered to give particulars of the facts upon which he bases his belief that the plaintiff is a person of hostile associations. When a man is detained in pursuance of this regulation, he is deemed to be in lawful custody.

Slade, in reply : We live in a free country and everyone is entitled to his liberty under Magna Carta, unless the detention is authorised by law. It is for those who have ordered the detention to justify it. Legislation dealing with the liberty of the subject must be construed in favour of the public, if possible.

MacKinnon, L.J. [delivering the judgment of the court] : By his writ the plaintiff claimed a declaration that his detention in Brixton Prison was and is unlawful and damages for false imprisonment. Para. 2 of the statement of claim alleges that the first defendant was, and the second defendant now is, His Majesty's Home Secretary. Paras. 3, 4 and 6 of the statement of claim are as follow :

> 3. By a document dated May 26, 1940, and expressed to be a detention order under the Defence (General) Regulations, 1939, reg. 18B, the first-named defendant ordered and directed that the plaintiff be detained. 4. In consequence and by reason of the said order and direction the plaintiff was on or about May 29, 1940, arrested and he has since been and still is detained and imprisoned at H.M. Prison at Brixton. 6. In the premises the defendants have and each one of them has caused and procured the unlawful detention and imprisonment of the plaintiff and the second-named defendant continues and intends to continue the same.

Para. 3 of the defence is as follows :

> The defendants admit that the first-named defendant ordered that the plaintiff should be detained under the Defence(General) Regulations, 1939, reg. 18B.

Para. 5 of the defence is as follows:

> None of the allegations contained in para. 6 of the statement of claim is admitted. Save as above expressly admitted, none of the allegations contained in the statement of claim is admitted.

The Defence (General) Regulations, 1939, reg. 18B, referred to in para. 3 of the statement of claim and in para. 3 of the defence, reads as A follows:

> If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained. B

The plaintiff took out a summons before the master asking for an order (i) that para. 3 of the defence be struck out upon the grounds that it purports to admit something which is not pleaded in the statement of claim and that it is embarrassing and contrary to the rules of pleading, or, alternatively, (ii) that the defendants do give particulars of para. 3 C of the defence (*a*) of the grounds upon which the first defendant had reason to believe the plaintiff to be a person of hostile associations, and (*b*) of the grounds on which the first defendant had reasonable cause to believe that, by reason of such associations, it was necessary to exercise control over the plaintiff. Master Moseley refused to make either D order. Tucker, J., dismissed an appeal from the master's decision, and gave leave to appeal to this court.

On the application to strike out para. 3 of the defence, we think that the decision of the master and of the judge was manifestly correct. We do not understand the suggestion that the paragraph is embarrassing or E contrary to the rules of pleading. As for the assertion that it purports to admit something which is not alleged in the statement of claim, that seems to be a mere exercise of verbal gymnastics. The statement of claim says that the first defendant ordered the plaintiff's detention by a document expressed to be a detention order under the regulation. If the F defence had said, "They admit that the plaintiff was detained under a document expressed to be under the regulation, which the document in fact was," no objection even of verbal nicety could have been made to it, and in effect and in substance that is what para. 3 of the defence asserts. However, it is really unnecessary to make these observations, since G counsel for the appellant at the hearing before us abandoned his appeal as to this part of the summons.

The material part of the summons clearly lies in the alternative application for particulars under para. 3 of the defence. At the hearing before us, counsel for the appellant asked to be allowed to amend this part of H the summons by an alternative claim for the like particulars under para. 5 of the defence. This, however, is a mere matter of form and not of substance. The object of the application, in either form, is to raise at this early and interlocutory stage of the proceedings a crucial question as to the onus of proof. If, in answer to the plaintiff's claim, it will be necessary for the defendants to prove, not only that the detention order was in form validly issued pursuant to the regulation, but also (i) the various facts which justified the first defendant in making such an order, and (ii) his reasonable and honest belief that it was necessary to make that order, then it may well be that the plaintiff might, in the discretion of the court, be entitled to such particulars as he asks for, but the plaintiff can only be entitled to such particulars if the onus is, as we have set forth, upon the defendants. In our opinion, the suggested onus does not so lie. If, at the trial, the plaintiff merely proved that he was detained in prison by an order of the first defendant, and nothing more, and if the defendants then proved that he was detained by an order issued pursuant to the regulation and signed by the first defendant (asuming that this was not admitted by the plaintiff), and if that was the whole of the evidence, we think that there would have to be judgment for the defendants.

To put the matter in another way, if the plaintiff admits, or if it is proved, that the plaintiff was detained by an order purporting or expressed to be issued under the regulation and duly signed as such, the burden is on the plaintiff, if he is to claim damages for false imprisonment, to give evidence showing that the order was invalid. As the case proceeds at the hearing, as often happens, the onus of proof may be shifted. If the plaintiff adduces evidence which goes to show the invalidity of the order, that might happen. If, upon that happening, the defendants produce evidence which is embarrassing to the plaintiff, by way of surprise or novelty, the judge would no doubt protect him by way of adjournment. Conceivably, in a proper case, the judge might at that stage make some order by way of particulars of the allegations of the defendants. These, however, are but hypothetical considerations as to possible developments at a later stage of the litigation. At this stage, we are quite clear that the plaintiff is wrong in his proposition as to the burden of proof inherently resting upon himself and upon the defendants respectively. We are clear that the plaintiff is not at this stage entitled to the particulars for which he asks, and that the decision appealed from was correct. The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Buckeridge & Braune* (for the appellant); *Treasury Solicitor* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

TATEM STEAM NAVIGATION CO., LTD. *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **June 19, 20, 1941.**]

Income Tax—Undistributed income—Company in which public substantially interested—Quotation in official list of stock exchange—Relative of person controlling company—Finance Act, 1922 (*c.* 17), *s.* 21—*Finance Act,* 1927 (*c.* 10), *s.* 31—*Finance Act,* 1936 (*c.* 34), *s.* 19 (2) (*a*).

The provisions of the Finance Act, 1922, s. 21, do not apply to a company in which the public are substantially interested. The public are stated to be substantially interested where shares controlling 25 per cent. of the voting power have been acquired unconditionally by the public and such shares have been the subject of dealings on a stock exchange in the United Kingdom and have been quoted in the official list of such a stock exchange. In the case of the appellant company, the necessary number of shares was not held by the public unless the shares held by Mrs. B. were included. Mrs. B. was a niece of Lord G., one of the persons controlling the company, and, at the material time, she held from 20,000 to 22,100 shares. Of these shares, 16,000 were the gift of Lord G., and the remainder she purchased. All the shares were included in, and subject to, her marriage settlement. At certain times in 1914 and 1915, the shares had been quoted in the official list of the Cardiff Stock Exchange, and at other times they were quoted under the heading of " other business done " :—

Held : (i) the company was one in which the public were substantially interested, because the shares subject to Mrs. B.'s marriage settlement were acquired unconditionally by her and she was not a relative within the meaning of the section, which defines a relative as a husband, wife, ancester, lineal descendant, brother or sister.

(ii) the shares had been quoted in the official list of the Cardiff Stock Exchange, because the section only required that they should at some time have been quoted in that list and not necessarily during the year of assessment.

(iii) on the evidence, quotations of " other business done " and in the supplementary list are quotations in an official list within the Finance Act, 1922, s. 21 (6) as amended.

Decision of Lawrence, J. ([1941] 2 All E.R. 111) *affirmed.*

[**EDITORIAL NOTE.** The main contention here is as to what is a company in which the public are substantially interested. It was contended that the shares held by a niece of one of the persons admittedly controlling the company were not shares held by the public. This argument was strengthened by the fact that the shares had been, as to the greater number of them, a gift, and were held by the trustees of the marriage settlement, one of such trustees being the person controlling the company. The decision, however, is based upon the terms of the section, which states that the shares shall be held unconditionally, and, since the gift of the shares was subject to no condition, it was held proper to include them among the number held by the public. It will be remembered that the Finance Act, 1922, s. 21 (6), quoted in the judgment herein has been amended by the Finance Act, 1936. The effect of the amendment is to re-enact the provisions of sect. 21 (6) in more general terms, but the definition of "relative " is retained in the same words. The relevant section at the present time is the Finance Act, 1936, s. 19 (1), (2).

As to Definitions in Finance Act, 1922, s. 21, see HALSBURY, Hailsham Edn., Vol. 17, pp. 290, 291, para. 576 ; and for Cases, see DIGEST, Supp., Income Tax, Nos. 674r-674z.]

Appeal by the Crown from an order of Lawrence, J., dated Mar. 31, 1941, and reported [1941] 2 All E.R. 111, where the facts are fully set out.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., and *Terence Donovan* for the respondents.

A SCOTT, L.J. : This is an appeal from a judgment of LAWRENCE, J., on a question about a company which, it is said, comes within the scope of the Finance Act, 1922, s. 21, as subsequently amended in various ways which do not really affect the question at issue in this appeal. The company in question is the Tatem Steam Navigation Co., Ltd., and the Crown contends B that it is a company in which there were "not more than five persons who controlled it," and that it was "a subsidiary company," and not "a company in which the public were substantially interested," conditions of the applicability of the section being contained in subsect. (6). The appeal turns on the third condition.

C In the special case, it is found as a fact that the total of the issued shares in the years in question (which need not be treated differently) was 350,000 £1 shares, with equal voting rights, and that between 98,000 and 93,000 of those shares were held by persons other than the five or less controlling persons who exercise control over the company. The Crown D contends that that holding—which, it may be observed, was substantially more than 25 per cent.—did not prevent the company from falling within sect. 21 of the Act of 1922, because the persons so holding those shares were, to an extent which reduced the public holding below 25 per cent., not members of the public, or, alternatively, did not hold their E shares in the capacity of members of the public. Sect. 21 (6) contains this provision :

> A company shall be deemed to be a company in which the public are substantially interested if shares of the company . . . carrying not less than 25 per cent. of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the year or other period for which the accounts of the F company have been made up as aforesaid beneficially held by, the public (not including a company to which the provisions of this section apply) and any such shares have in the course of such year or other period been the subject of dealings on a stock exchange in the United Kingdom and the shares have been quoted in the official list of such a stock exchange.

Amongst the shareholders holding the 90,000-odd shares was Mrs. Blyth, G a niece of Lord Glanely. The latter was the principal personal owner of shares in the company, holding between 160,000 and 170,000 shares. The niece held in 1935 20,000 shares, and in 1936 and 1937, the other two years relevant to the appeal, 22,100 shares. Of those shares, 4,000 had been purchased by Mrs. Blyth herself and 16,000 had been trans- H ferred to her by Lord Glanely, her uncle, in Mar., 1928, as a gift in connection with her then impending marriage. They were settled on her by the terms of her marriage settlement. Subsequently, she bought another 2,100 shares. If her total holding of 22,100 shares, or even the 16,000 gift shares, was struck out of the 90,000-odd shares to which I have referred, the result would be that less than 25 per cent. of the shares would be held by the public. Of that there can be no question.

The issue in the case is thus whether the 16,000 shares were held by her as a member of the public, and that question depends on the meaning of the words " the public " in subsect. (6). The provision that the shares must have been allotted to, or acquired by, the persons holding them unconditionally is not in issue, for it is not disputed that these shares were acquired by Mrs. Blyth unconditionally, and so held for the rest of the time in question. I postpone consideration of the further conditions as to there having been dealings in the shares on a stock exchange in the United Kingdom and as to the shares having been quoted in the official list of such a stock exchange.

On the main question, the commissioners held as follows :

> Assuming that the 4,000 and 2,100 shares purchased by Mrs. Blyth can be said to have been acquired by her as a member of the public, there remains the 16,000 given by Lord Glanely to his niece . . . In our opinion, it cannot be said that these 16,000 shares were allotted to, or acquired by, the public.

Then they gave various reasons, with all of which I disagree. They say :

> They were not purchased in the market or acquired in any way for valuable consideration.

The fact that they were not purchased, or were not acquired for valuable consideration, is, in my opinion, an irrelevant matter. The commissioners go on as follows :

> They were a personal gift from Lord Glanely, who controlled the company, out of his own private holding of shares . . .

The fact that they were a gift, the fact that Lord Glanely was her uncle, and the fact that they were coming out of his own private holding of shares, are all, in my opinion, irrelevant matters in considering the construction of the section of the statute, and so are the facts that they were " an accretion to her marriage settlement funds " and that Lord Glanely " was one of the trustees of this settlement." Then the commissioners go on as follows :

> Upon these facts we find that this transaction was not an acquisition by an allotment to the public.

Of course it was not an allotment to the public, but it was an acquisition by her from her uncle. I cannot understand why the fact that she was a niece or that it was a gift or that it was for the purpose of her marriage settlement makes any difference at all.

The definition of " control " contained in sect. 21 (6) is as follows :

> A company shall be deemed to be under the control of any persons where the majority of the voting power or shares is in the hands of those persons or relatives or nominees of those persons, or where the control is by any other means whatever in the hands of those persons. The expression " relative " means a husband or wife, ancestor, or lineal descendant, brother or sister.

It is to be observed that a niece does not come into the category.

The scheme of the subsection undoubtedly was that, where the control of a company is in fact held by not more than five persons, and the company is not one in which the public are substantially interested in the manner indicated by the proviso, the persons controlling the company should be treated as running it in their own interests, and, therefore, in a position which, from the public point of view, ought to make them liable to pay sur-tax just as if the company had been a firm and they had drawn their share of profits direct from the business. However, a limitation was imposed on that general principle, not only by limiting it to a case of not more than five persons having control and by excluding the case of a subsidiary company, but also by the provision that, if the public held shares to the extent of 25 per cent., that would take the company wholly outside the section. I can see no reason whatever for introducing any notions of control other than those plainly indicated in the section as constituting the *de facto* control which is what the section primarily contemplates. There is no suggestion of that in this case. There is no suggestion, there is no evidence, and there is no finding that Lord Glanely had in fact any control over his niece. Nor is there any suggestion that his niece was a nominee of his, or of any of the other persons within the limited category of five. Nor is there any suggestion that he even had any influence over her. An implication of control is raised by the statutory presumption in the case of husband and wife, ancestor, lineal descendant, brother and sister, but in the case of no others. Consequently, we must regard a person in the position of a niece as being treated by the statute as a member of the public. The statute contains no prohibition against avuncular generosity, any more than against generosity to a person between whom and the donor there is no consanguinity or relationship at all. That being so, I agree with the judge, who held, disagreeing with the commissioners, that the latter had drawn an inference of law for reasons which in law amounted to no reasons at all.

I have added my own words about the section only because it is said that the question is one of general importance, but, in my view, the meaning of the section is clear. There is no reason why the word "public" should be given anything but its ordinary meaning. The second definition contained in Murray's Oxford Dictionary is :

> The community as an aggregate, not in its organised capacity, hence the members of the community.

It is in that sense, as it seems to me, that the words "the public" are used in this section. Consequently, it follows that there is in this case a holding of more than 25 per cent. of the shares by the members of the public.

I listened with interest to the argument of the Attorney-General that that interpretation of the section is impossible, but, quite frankly, I am not able to follow the reasoning by which he sought to arrive at that conclusion, and, therefore, I do not attempt to deal with it. I agree with the whole of the judgment of the judge, to whom the same argument was addressed. The appeal must be dismissed with costs.

Clauson, L.J. : I agree with the judgment of Scott, L.J., and also with that of Lawrence, J., who, if I may respectfully say so, in my judgment dealt with the case with complete accuracy. In these circumstances, I do not find it necessary to add any observation of my own.

Goddard, L.J.: I agree with the judgment of Scott, L.J., and with that of Lawrence, J., in its entirety, both on the question whether Mrs. Blyth's shares were to be regarded as held by a member of the public and on his finding in support of the commissioners on the point about the quotation from the official list.

Appeal dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *William A. Crump & Son*, agents for *Gilbert Robinson & Co.*, Cardiff (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

EXECUTORS OF H. PETERS, DECEASED *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **June 18, 1941.**]

Income Tax—Sur-tax—Deductions—Annual payments—Allowance by husband to wife—Voluntary allowance under oral agreement.

A husband and wife agreed in May, 1929, to live apart, it being also agreed, *inter alia*, that the wife was to be paid £850 per annum by monthly instalments. In 1932 this sum was reduced to £808 per annum and in 1933 it was further reduced to £764 per annum. On both these occasions the husband had written a memorandum to the wife stating that he was obliged to reduce the amount of the payment, and the wife had made no protest. At the time of the separation the wife had requested that a formal agreement should be drawn up, but the husband had not agreed to that suggestion. In a letter to his solicitor in 1929, he had referred to the payment to his wife as "an allowance." The wife had never claimed repayment of tax in respect of the annual payments from the Inland Revenue authorities, nor had the husband claimed them as a deduction. The husband died on June 25, 1939, and his executors claimed, in respect of the year ending Apr. 5, 1939, to deduct the annual payment from the deceased's total income:—

Held: these facts supported the inference that there was an oral agreement to pay these annual sums and they were proper deductions in assessing the total income of the deceased.

[**EDITORIAL NOTE.** This case is important for two reasons. In the first place, when differences arise between husband and wife, they generally wish the matter settled as privately as possible and are anxious to avoid any formal record of their disputes. The facts here considered must, therefore, be of frequent occurrence and, as the history of this case shows, are likely to give rise to a difference of opinion as to their effect in law. In the second place, there is, of course, no appeal on a question of fact from the commissioners. It is often extremely difficult to distinguish between a finding of fact and a finding of law based upon the findings of fact, and some remarks upon this matter were recently made in the House of Lords in *Bomford* v. *Osborne* (p. 426, *ante*). In the present case Lawrence, J., would have reversed the decision of the Commissioners, but felt that he had no jurisdiction to do so as the matter was wholly a decision on the facts. The Court of Appeal have, however, found themselves able to overcome this difficulty, since, in their opinion, there were inconsistent findings in the case stated. The judgments of the Court of Appeal may prove helpful in considering when an appeal may be brought in an income tax case.

AS TO DEDUCTIONS IN COMPUTING TOTAL INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 275, 276, para. 546; and FOR CASES, see DIGEST, Vol. 28, p. 112, No. 689.]

Cases referred to:

(1) *Aldridge* v. *Aldridge* (*otherwise Morton*) (1888), 13 P.D. 210; 27 Digest 226, *1969*; 59 L.T. 896; *sub nom. A.* v. *M.*, 58 L.J.P. 8.

(2) *McGregor* v. *McGregor* (1888), 21 Q.B.D. 424; 27 Digest 229, *2004*; 57 L.J.Q.B. 591.

(3) *Walter* v. *Walter*, [1921] P. 302; 27 Digest 279, *2494*; 90 L.J.P. 372; 125 L.T. 575.

APPEAL by the executors of the deceased taxpayer from an order of LAWRENCE, J., dated Apr. 8, 1941. In May, 1929, the deceased and his wife verbally agreed to separate, and at the same time the deceased further agreed, *inter alia*, to pay his wife a sum of £850 per annum by monthly instalments. He expressly refused to sign any document recording the agreement, and on two subsequent occasions he reduced the amount of the payment without asking his wife's consent. He died on June 25, 1939, and his executors were assessed to sur-tax in respect of the deceased's total income, including the payment to the wife, for the year ended Apr. 5, 1939. The executors appealed against this assessment, so far as it related to the sum paid to the wife, to the Commissioners for the Special Purposes of the Income Tax Acts, who decided that the payment was properly included in the assessment. The appellant executors thereupon required them to state a case under the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. The case stated, so far as material, was as follows:

> (2) The sole point of dispute in the case is whether certain monthly sums paid by the deceased to his wife, in the circumstances hereinafter appearing, were deductible in arriving at the amount of the sur-tax assessment under appeal. (3) Mrs. Isabel Sara Peters gave evidence before us, which we accepted. She married the late Henry Peters on Nov. 29, 1887, and in May, 1929, she and her husband agreed to separate permanently. Since that date she had never seen her husband. At the time of the separation the late Mr. Peters agreed to pay her £850 a year by monthly instalments and to let her have the use of certain furniture, linen and plate during her lifetime. The £850 per annum was duly paid up to Jan., 1932, when the yearly allowance was reduced from £850 to £808 per annum. This yearly sum was duly paid up to July, 1933, when the allowance was further reduced to £764 per annum, and this allowance at the rate of £63 13*s.* 4*d.* per month was duly paid up to the date of Mr. Peters' death, on June 25, 1939.

The commissioners went on to refer to a letter, dated Apr. 27, 1929, written by the deceased to his solicitor Frederick Sneath (one of the appellants), a copy of which was annexed to the case, and which was in the following terms:

> Will you please prepare another codicil to my will. I have forgotten (in fact I did not know at the time) that I omitted to have a clause giving my wife the use of the furniture she is going to have for her flat during her lifetime. I am giving her an allowance of £850 payable monthly and she has taken a flat for which she agrees

> to pay £230 per annum. I have told her she may have the drawing-room furniture and her bedroom furniture, a certain quantity of plate and linen, etc. . . .

The commissioners also referred to a memorandum, dated Apr. 27, 1929, sent by the deceased to his wife, a copy of which was annexed to the case stated, and which was in the following terms:

> . . . the furniture pictures plate linen china and kitchen utensils now in this house [5 Sussex Place] belong to me and are to be sold by my trustees after my death, except what you have for life in your flat. You are to have the interest on the capital created by the sale and at your death it becomes part of my estate . . . P.S. Your financial position at my death. As it is doubtful what the furniture etc. will fetch at my death . . . I am adding a codicil to my will that my trustees pay to you £200 yearly . . .

The commissioners continued as follows in para. (3) of the case stated:

> (3) At the time of separating, Mrs. Peters had suggested that a document should be drawn up, but her husband had refused to sign any formal document. When the two reductions in the amount of the allowance had been made, she had not been consulted, but her husband had merely written her a memorandum enclosing a cheque saying that he was obliged to reduce the amount owing to his expenses. Mrs. Peters had never made any claim to the Inland Revenue authorities for repayment of tax in respect of the allowance, nor had the deceased claimed the allowance as a deduction during his lifetime. (4) On these facts, it was contended by the appellants that the monthly sums paid to his wife during the year under appeal were made under a verbal contract with the deceased, that he was under a legal obligation to maintain his wife and that, but for the agreement, she would have been entitled to resort to legal proceedings against him, and, therefore, that the annual payments, as such, constituted charges on the income of the deceased, and were accordingly proper deductions in arriving at the total income of the deceased for purposes of sur-tax. (5) It was contended on behalf of the Commissioners of Inland Revenue (*inter alia*) that the monthly payments made to the wife were not made in pursuance of any legal obligation, and were not annual payments within the meaning of the Income Tax Acts, but were mere voluntary allowances, and, accordingly, not proper deductions in arriving at the sur-tax assessment under appeal. (6) Having considered the contentions and evidence adduced before us, we, the commissioners who heard the appeal, held that the monthly sums paid to the wife were voluntary applications of the deceased's income, and, as such, were not annual payments constituting charges on his income. We held that the sums were not proper deductions in computing the assessment under appeal, and we accordingly confirmed the assessment.

When the appeal by way of case stated came before Lawrence, J., he decided that there was some evidence before the commissioners upon which they could find that the monthly sums paid were mere voluntary applications of the deceased's income. Such evidence was afforded by the facts, as found by the commissioners, that the allowance had been twice reduced without any protest by the wife, that the deceased had refused to comply with his wife's request to draw up and sign a formal agreement, and that, in the letter to his solicitor dated Apr. 27, 1929, he had said that he was going to make his wife "an allowance." Notwithstanding the judge's disagreement with the commissioners' decision, he felt bound by their finding, since there was evidence to support it, and, accordingly, with the greatest reluctance and doubt, he dismissed the appeal with costs.

Cyril L. King, K.C., and *J. H. Bowe* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

Scott, L.J.: The question in this case is whether or not, in the circumstances established by the findings of fact by the commissioners, the taxpayer in question had a right to deduct the yearly sum payable under an agreement between him and his wife, whereby they agreed that they should live separate permanently—that is to say, for the rest of their joint lives—on the terms of his paying to the wife an annual sum of £850, subsequently reduced to £764. It is conceded by the Crown that, if that payment was due under the terms of a binding legal agreement between the parties, the income of the husband is rightly to be treated as reduced by the amount of that payment, so that the only portion of the income which would attract tax is the reduced amount. The taxpayer in question died in 1939, and the question was raised by the executors of his will, they having been assessed to sur-tax in respect of the total income of the deceased for the year ended Apr. 5, 1939, in the sum of £8,719. The sole dispute in the case is whether the annual payment of £764 ought to have been allowed by the income tax authorities as a proper deduction from that sum of £8,719.

It is necessary to go into the circumstances by which the deceased man entered into the obligation, as contended by the executors, to make the payment out of his income so as to constitute it a charge upon the income, with the result that the taxable income would be his net income less that amount. That issue depends upon whether in 1929 the deceased did or did not make a legally binding agreement with his wife that they should thereafter live separate permanently and that he should pay her a definite annual sum by monthly instalments and allow her to have the use of certain furniture etc. during her lifetime.

The wife was called by the executors as a witness before the commissioners, and, after hearing her evidence, they came to certain decisions, which are quite clearly expressed in the special case stated. They say in para. (2):

> The sole point of dispute in the case is whether certain monthly sums paid by the deceased to his wife, in the circumstances hereinafter appearing, were deductible in arriving at the amount of the sur-tax assessment under appeal.

Whether it was sur-tax or income tax does not make any difference for the purposes of the appeal. Then in para. (3) they say:

> Mrs. Isabel Sara Peters [the wife] gave evidence before us, which we accepted. She married the late Henry Peters on Nov. 29, 1887, and in May, 1929, she and her husband agreed to separate permanently. Since that date she had never seen her husband. At the time of the separation, the late Mr. Peters agreed to pay her £850 a year by monthly instalments and to let her have the use of certain furniture, linen and plate during her lifetime. The £850 per annum was duly paid up to Jan., 1932.

I pause there for a moment to say that part of the paragraph which I have just read purports to be a statement of the evidence given by Mrs. Peters, which the commissioners accepted. No other witness was called. The only other evidence before the commissioners was two documents, one a letter and another a memorandum, which I will read presently. *Prima facie*, the wording of para. (3) of the case, which I have read, records quite clearly an agreement between the parties in which they agreed to live separately from each other permanently. In my view, there can be no doubt at all that an agreement to that effect is legally binding, the promise of the one party being the consideration for that of the other. Whatever may have been the law in the middle part of last century, it is now recognised that an agreement to that effect between husband and wife is an agreement for good consideration. However, the commissioners go further, and find as a fact that the undertaking by the deceased to pay his wife £850 per annum was a term of the self-same oral agreement. If so, it was equally binding with the rest of the agreement. That this is their meaning is clear from their finding that it was at the same time as they agreed to live apart permanently that the husband agreed to make the wife that payment. If an oral agreement of that kind can be sufficient in law to constitute a binding legal agreement, binding upon the income of the husband, there is no doubt that an agreement to that effect is found definitely by the commissioners as a fact. The case goes on to state that in 1932 the yearly allowance was reduced from £850 to £808, and that that sum was duly paid up to July, 1933 :

> . . . when the allowance was further reduced to £764 per annum, and this allowance at the rate of £63 13*s.* 4*d.* per month was duly paid up to the date of Mr. Peters' death on June 25, 1939.

The word "duly" emphasises the legally binding character of the husband's obligation.

It was argued for the Crown that that reduction in the original amount showed of itself that there had been no binding agreement to pay the original amount. I confess that I do not follow the reasoning upon which that contention is based. It is quite true that from the subsequent reductions the commissioners might have inferred, in the absence of protests from the wife, that no original agreement had been made, but that is not the inference drawn by the commissioners. They find as a fact that the husband and the wife did agree on the terms I have mentioned. Even if the commissioners concluded from the subsequent reductions that one or other party was not really intending to make the agreement which they said they were making, that intention would not be admissible evidence to control the terms of the agreement in fact made, unless, of course, it amounted to a case of mutual mistake, which might give rise to questions of rectification. Otherwise, however, the subsequent reductions are irrelevant, and some explanation of the subsequent reductions is afforded by the commissioners in a further part of para. (3) :

> When the two reductions in the amount of the allowance had been made, she had not been consulted, but her husband had merely written her a memorandum enclosing a cheque saying that he was obliged to reduce the amount owing to his expenses.

Those facts fall far short of constituting any evidence at all of any intention of the husband at the time when he made the agreement, and *a fortiori* for inferring the absence of an agreement made in the terms in which the commissioners have already found. A similar observation applies to the commissioners' further statement in the same paragraph :

> At the time of separating, Mrs. Peters had suggested that a document should be drawn up, but her husband had refused to sign any formal document.

By itself, that is of no relevance at all, if the case was, as the commissioners find, that the husband did agree orally to the terms of the separation agreement and to the payment of the £850 annuity.

The commissioners also annex a letter written by the deceased husband to his solicitor, one of the appellant executors, and a memorandum written by him to his wife in the previous month, Apr., 1929. In his letter to the solicitor executor the husband asks him to prepare another codicil to the will and then says :

> I have forgotten (in fact I did not know at the time) that I omitted to have a clause giving my wife the use of the furniture she is going to have for her flat during her lifetime. I am giving her an allowance of £850 payable monthly, and she has taken a flat for which she agrees to pay £230 per annum. I have told her she may have the drawing-room furniture and her bedroom furniture, a certain quantity of plate and linen, etc. I will send on a list of these things presently. Mrs. Peters takes possession [of the flat] on May 25, I believe.

As I read that letter, he is saying there : "At the time when I made my will, I did not know the present circumstances of separation and my promise to my wife that she should have the use of certain furniture for her flat during her lifetime" Again, that is wholly irrelevant, except as an indirect piece of evidence raising a possible doubt as to whether or not an agreement was made. I should regard it as of no value as evidence for that purpose, although I assume for the moment that it might have been so regarded by the commissioners. However, it is quite clear that they did not treat it as justifying them in saying that no agreement was made. It is to be observed that in this letter the deceased recognised that his wife was going to pay £230 for her flat, and, consequently, must have looked upon the £850 annuity as a matter of right, justifying her in incurring that financial liability. Therefore, in my opinion, that matter has no bearing on the commissioners' fundamental finding in para. (3).

The memorandum is addressed to his wife, which again, in my view, really adds nothing to the matter, except that it shows quite clearly that he contemplated her living permanently in the flat for the rest of his life, and shows that he had thought it wise to add a codicil to his will giving her a life interest in the furniture in question, which he had agreed that she should have. Again, the fact that he thought it wise to put that into his will has only a very indirect bearing, and the commissioners have not treated it as justifying any alteration in their fundamental finding that the agreement was made. It does not, in my view, call for any further observation.

In the special case, the commissioners proceed to state the contention of the appellants as being that the sums paid to the wife annually by the husband "were made under a verbal contract with the deceased." That is a contention of fact to which they give effect in the finding which I have already read. Then they state a further contention that the husband :

> . . . was under a legal obligation to maintain his wife, and that but for the agreement, she would have been entitled to resort to legal proceedings against him, and, therefore, that the annual payments as such constituted charges on the income of

> the deceased, and were, accordingly, proper deductions in arriving at the total income of the deceased for purposes of sur-tax.

That is not a very logical statement of the contention of the appellants before the commissioners, but it is quite clear what it was. In reality, it was a contention that a binding agreement had been made.

The contention of the Inland Revenue Commissioners is stated as being that the monthly payments were not made

> . . . in pursuance of any legal obligation, and were not annual payments within the meaning of the Income Tax Acts, but were merely voluntary allowances and, accordingly, not proper deductions in arriving at the sur-tax assessment under appeal.

That the payments were not made in pursuance of any legal obligation is a finding of fact. Whether they were annual payments within the meaning of the Income Tax Acts is a question of law. In para. (6,) the commissioners state their conclusions as follows :

> Having considered the contentions and evidence adduced before us, we held that the monthly sums paid to the wife were voluntary applications of the deceased's income, and, as such, were not annual payments constituting charges on his income.

I put it to counsel who followed the Attorney-General in argument for the respondents that, if the conversation between the husband and the wife had been to the following effect, it might account for the use of that word by the commissioners. Supposing the husband had said to the wife: "If you will voluntarily leave the matrimonial home and undertake never to come back to it, I will voluntarily promise to give you £850 per annum." That amounts clearly to an agreement of a binding legal character, voluntarily made by both parties, representing the *consensus ad idem* of their wills. I can see no evidence at all before the commissioners justifying any modification of the legal results flowing from the agreement which they find in para. (3) of the special case, which I have read.

Certain authorities were cited to us by counsel for the appellants which show that an oral agreement of separation is, or may be, just as binding as either an agreement in writing or a deed. It is to be observed that an agreement in writing but not by deed is in law no more effective than, and no different in its nature from, an oral agreement. However, beyond referring to these cases by name, I do not think it necessary to go into them. The decisions were *Aldridge* v. *Aldridge* (1), *McGregor* v. *McGregor* (2) and *Walter* v. *Walter* (3). Those decisions show that an oral agreement, if in fact made between a husband and a wife for a separation, may be perfectly valid. In two of these cases, the agreement was made in respect of a definite undertaking not to take proceedings in the Divorce Division, but, even if that consideration were not stated, the consideration underlying any such agreement is equally present—namely, the wife gives up her right to claim restitution of conjugal rights on an allegation of desertion by her husband, and the husband in the same way gives up certain rights he may have against his wife and gains the advantage of his wife not being able to pledge his credit. These considerations are ample considerations in the contractual sense for the agreement made.

In my view, the finding of fact by the commissioners here entitles the executors to succeed. Therefore, I have nothing further to say except that the judge said at the outset that he dismissed the appeal " with the greatest reluctance and doubt," and, at the end of his judgment, after referring to certain points which he thought afforded evidence upon which the commissioners might have acted, he remarked :

> As I say, these facts appear to me to be some evidence upon which the commissioners might find that this was a voluntary allowance, and, although I entirely disagree with them, I think that the appeal must be dismissed with costs.

Those were the facts to which I have already referred—namely, (i) that the annuity was reduced twice without communication by the wife to the deceased, (ii) that, at the time of separation, the wife had suggested that a document should be drawn up and that the deceased had refused, and (iii) that in his letter the deceased had referred to what he was going to pay to his wife as being "an allowance." In my view, none of these matters constitutes evidence upon which the commissioners were entitled to come to the conclusion that there had been no agreement, but, whether or not they were facts which would have entitled them to come to that conclusion, they rejected them, and did find that there was a binding agreement. For these reasons, the appeal must be allowed with costs here and below.

Clauson, L.J. : I agree. The way the matter strikes me is this. The following facts have been found, and from them there can be no departure. Mrs. Peters married Peters on Nov. 29, 1887, and in May, 1929, she and her husband agreed to separate permanently :

> Since that date she had never seen her husband. At the time of the separation, the late Mr. Peters agreed to pay her £850 a year by monthly instalments and to let her have the use of certain furniture, linen and plate during her lifetime. The £850 was duly paid up to Jan., 1932, when the yearly allowance was reduced from £850 to £808 per annum. This yearly sum was duly paid up to July, 1933, when the allowance was further reduced to £764 per annum, and this allowance at the rate of £63 13*s.* 4*d.* per month was duly paid up to the date of Mr. Peters' death on June 25, 1939.

On the facts there stated, there is an inevitable conclusion of law—namely, that there were mutual promises on the part of the husband not to insist on co-habitation and to pay £850 per annum and on the part of the wife not to insist on co-habitation. Probably, it may well be that there is also to be implied an agreement not to molest and so on, but we need not trouble about that. Those facts, as I have read them, and as they are stated, lead inevitably to the conclusion that Peters was bound as a matter of law to pay £850 per annum to his wife during her life. On those facts, no conclusion could be reached other than that that sum was one which he was bound by law to pay, and which he was, therefore, entitled to deduct from his income for the purposes of his sur-tax return. There are some further facts stated :

> At the time of separating, Mrs. Peters had suggested that a document should be drawn up, but her husband had refused to sign any formal document.

What is the result of that ? Nothing. An agreement was entered into, and the man refused to reduce it to writing, but a binding oral agreement is not made any the less binding because a man says: " I will not reduce it to writing." I quite agree that, if it was doubtful whether or not the agreement was entered into, the fact that the party who was claiming that the agreement had been entered into asked the other party to reduce it to writing and he refused, saying, " There is no agreement, and I will not put it in writing," might be material, but, if once a conclusion is reached that there was an oral agreement, a mere refusal to reduce the oral agreement to writing can have no effect upon the rights of the parties at all. Then the commissioners state:

> When the two reductions in the amount of the allowance had been made she [the wife] had not been consulted, but her husband had merely written her a memorandum enclosing a cheque saying that he was obliged to reduce the amount owing to his expenses.

What is the effect of that? A man who is bound to pay £850 per annum is sending a memorandum to his wife saying: " I am only going to pay you £808." That cannot affect her rights. She did not sue for the balance of £42. Perhaps she was willing to give it up, but that nevertheless left the deceased's obligation quite untouched. A further fact stated is this:

> Mrs. Peters had never made any claim to the Inland Revenue authorities for repayment of tax in respect of the allowance, nor had the deceased claimed the allowance as a deduction during his lifetime.

Again, I fail to see that that throws any light upon the matter at all. The agreement had been entered into, and the fact that the man was content, in effect, to pay income tax on the sum he was paying to his wife—though I should have thought that it was pretty clear that he was not legally bound to do so—can throw no light upon the matter at all, save, of course—and this is the same saving as that to which I referred just now—that, if there had been any question as to whether the agreement had been entered into, those facts might be material. However, that has been decided. They did in fact meet and make the oral agreement which has been stated. Nevertheless, the commissioners in para. (6) find as follows:

> Having considered the contentions and evidence adduced before us, we, the commissioners who heard the appeal, held that the monthly sums paid to the wife were voluntary applications of the deceased's income, and, as such, were not annual payments constituting charges on his income.

It is impossible for them to find that. As a matter of law, it was wholly wrong to find it. The legal deduction from the facts stated in para. (3) as I have read them leads to precisely the contrary conclusion.

Of course, it is conceivable that the commissioners had in mind that they were setting out the facts in this way—namely, that the two parties in fact separated, though without any consensus, or with such consensus only as appeared from the fact that they did separate, and that the man made a wholly independent promise to make a voluntary allowance. However, if the evidence had satisfied the commissioners that that was the fact, they should have stated it, but they did not. They stated that these two parties entered into the agreement. Once they had stated that, I cannot see how they can whittle away those facts, which are the only facts before the court, by saying that they are going to give them a legal effect which it is impossible to give them. Accordingly, as I have stated, they said that the payments were voluntary, and the matter came before LAWRENCE, J. It is quite obvious from the judgment of LAWRENCE, J., that he was quite satisfied that the commissioners had come to a wrong conclusion, a view with which I most heartily agree, but LAWRENCE, J., quite properly, if I may say so respectfully, hesitated to interfere with the jurisdiction and right of the commissioners to find—and, when found, to state—facts. He took the view, with which I must confess that I do not agree, that the facts stated in the latter part of para. (3)—namely, as to the modification of the annuity and as to the refusal of the deceased to sign documents—were relevant to qualify the fact stated in the beginning of para. (3). I think that LAWRENCE, J., is saying that they might be relevant, just sufficiently relevant to enable the commissioners to come to the conclusion to which they did come. As regards that, with all respect to the judge, I must say quite plainly that I do not agree. It appears to me that, for the reasons I have endeavoured to explain, those facts were wholly irrelevant when the conclusion had once been stated that the agreement had been made. In those circumstances, we are able to reverse this decision and to hold that the appeal is successful.

GODDARD, L.J. : I agree, and I do not think that I can usefully add anything.

Appeal allowed with costs.

Solicitors : *Waterhouse & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re BELLVILLE, WESTMINSTER BANK, LTD. *v.* WALTON.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), **May 19, 27, 29, 1941**.]

Wills—Construction—Gift to individuals born after date of will—Exclusion of those born after death of testator—Rule of convenience.

A testator directed his executors to pay to any daughter or daughters of his nephew who should be born after the date of his will the sum of £10,000 each for their sole and separate use. A daughter was born to the nephew after the date of the will but also after the testator's death :—

HELD : under such a gift a daughter born after the death of the testator is not entitled to the legacy.

[**EDITORIAL NOTE.** The construction of wills is in certain respects governed by a number of rules of convenience, many of which are designed to ensure that the estate may be distributed within a reasonable time. If, in a case like the present, where each daughter is to receive a stated sum, daughters born after the testator's death are to be let in, then it may be impossible for a very long time to know the total amount necessary to satisfy the bequest. On the other hand, if a stated sum is to be shared by all such children, such sum can be set aside and the estate distributed. For this reason a rule of convenience has been adopted whereby, in cases like the present, persons born after the death of the testator are excluded unless the total amount required to satisfy the bequest can then be ascertained. The rule, however, is not applied where the postponement of distribution is expressly contemplated by the testator.

As to Gifts to Groups of Individuals, see HALSBURY, Hailsham Edn., Vol. 34, pp. 278, 279, para. 329; and for Cases, see DIGEST, Vol. 44, pp. 759, 760, Nos. 6174-6190.]

Cases referred to:

(1) *Ringrose* v. *Bramham* (1794), 2 Cox, Eq. Cas. 384; 44 Digest 759, *6178*.
(2) *Mann* v. *Thompson* (1854), Kay, 628; 44 Digest 759, *6183*; 23 L.T.O.S. 345.
(3) *Rogers* v. *Mutch* (1878), 10 Ch.D. 25; 44 Digest 759, *6184*; 48 L.J. Ch. 133.
(4) *Garbrand* v. *Mayot* (1689), 2 Vern. 105; 44 Digest 759, *6174*.
(5) *Evans* v. *Harris* (1842), 5 Beav. 45; 44 Digest 759, *6182*.
(6) *Defflis* v. *Goldschmidt* (1816), 1 Mer. 417; 44 Digest 760, *6185*.

Appeal by the defendant C. A. Bellville from an order of Farwell, J., dated Feb. 21, 1941. The facts are fully set out in the judgment of the court delivered by Luxmoore, L.J.

H. Wynn Parry, K.C., and *J. A. Wolfe* for the appellant.

Hon. C. R. R. Romer, K.C., and *E. M. Winterbotham* for the respondents.

Luxmoore, L.J.: The late William John Bellville by his will, dated Oct. 21, 1936, among other provisions directed his executors and trustees to pay to any daughter or daughters of his nephew Anthony Seymour Bellville who should be born after the date of his will, but before any further son of his nephew should be born, the sum of £10,000 each for their sole and separate use. At the date of his will, the testator's nephew Anthony was married and had two children—a daughter born on Mar. 29, 1930, and a son, Jeremy Francis, born on Nov. 22, 1931. The testator died on Feb. 25, 1937. On Nov. 30, 1939, another child (Camilla Audrey) was born to the nephew. The will contains a number of peculiar provisions, and it is not surprising that the executors and trustees found it necessary to apply to the court by originating summons for its decision on a large number of questions with regard to the construction of the will and the method of administration of the testator's estate. One of the questions raised by the summons was whether the daughter Camilla Audrey was entitled, on the true construction of the will, to a legacy of £10,000. The originating summons was heard by Farwell, J., on Dec. 5, 1940. By his order, it is declared that

> . . . as the daughter Camilla Audrey Bellville being a daughter of the testator's nephew Anthony Seymour Bellville was conceived after the death of the testator she has not become entitled to a legacy of £10,000 under cl. 8 of the will of the said testator.

This appeal was entered on behalf of Camilla Audrey Bellville on Mar. 17, 1941, asking that the above-mentioned declaration may be reversed and that it may be declared that

> Camilla Audrey Bellville notwithstanding she was conceived and born after the death of the testator became entitled on her birth to a legacy of £10,000 under the provisions of cl. 8 of the will.

Clause 8, so far as material, provides as follows :

> I direct that my executors and trustees shall pay to any daughter or daughters of my nephew Anthony Seymour Bellville who shall be born after the date of this my will and who shall be born before any further son born to my nephew Anthony Seymour Bellville (such said son being the son next in age to my nephew's present son Jeremy Francis Bellville) the sum of £10,000 each for their sole and separate use and if at the date of my death such daughters of Anthony Seymour Bellville are infants then my trustees are to retain any sums of £10,000 which may be payable hereunder and to pay the same over to the said daughter or daughters upon their attaining the age of 21 years or marrying under that age.

It appears from the judgment that the judge accepted the argument addressed to him by counsel that, if the words of the gift " to any daughter or daughters of my nephew Anthony Seymour Bellville who shall be born after the date of this my will " had stood alone and with nothing else, they would clearly include among the class to take the daughter Camilla Audrey, as she was a daughter of Anthony and was born after the date of the will. The judge went on to consider the rest of the will, and found in it indications which, in his opinion, were sufficient to satisfy him that, upon the true construction of the will, the testator had expressed his intention to confine the gift to daughters of Anthony born after the date of the will but before his death. While we agree with the judge's conclusion that Camilla Audrey Bellville is not entitled to receive a legacy of £10,000, because she was conceived and born after the death of the testator, we have come to this conclusion for a reason different from that stated by him. We are unable to accept the view that, if the words of the gift " to any daughter or daughters of my nephew Anthony Seymour Bellville who shall be born after the date of my will " had stood alone, Camilla Audrey Bellville would have been qualified to receive a legacy of £10,000. Such view is, we think, contrary to a long line of authority, to which the attention of the judge was not called, and which has established that the rule which, as is stated in HAWKINS ON WILLS, 1st Edn., p. 73 :

> . . . admits objects born after a testator's death and before the period of distribution to share in a bequest only applies where the total amount of the gift is independent of the number of objects among whom it is to be divided and is therefore not increased by the construction adopted. But a gift of a certain sum to each of a class of objects at a future period is confined to those living at the testator's death. Thus under a gift of £500 to all and every the children of A payable at 21 children born after the testator's death and before the eldest child attains 21 are included, if the gift be of £50 each to all and every the children of A payable at 21 the children living at the testator's death alone are entitled (*Ringrose* v. *Bramham* (1), *Mann* v. *Thompson* (2)). The reason given is that in the latter case if after-born children were admitted the distribution of the personal estate of the testator would have to be postponed till it could be ascertained how many legacies of the given amount would be payable.

The passage quoted above was cited with approval by JESSEL, M.R., in *Rogers* v. *Mutch* (3), at p. 27. The rule has admittedly been recognised in many cases reported in the books, starting with *Garbrand* v. *Mayot* (4) in 1689 and continuing through *Rogers* v. *Mutch* (3) in 1878 to the present time. Several of these cases are referred to in Halsbury's Laws of England, Hailsham Edn., Vol. 34, p. 278, note (*s*). The rule, of course, does not apply where the inconvenience referred to in the passage quoted does not exist, or is expressly contemplated by the testator. An example of the former exception is to be found in *Evans* v. *Harris* (5), where a fund was set apart out of which alone the legacies in question were payable, and of the latter exception in *Defflis* v. *Goldschmidt* (6).

It follows that, in our opinion, the correct method of construing the gift in the present case is to consider whether there is anything in the testator's will to prevent the application of the rule, and that, if there is no sufficient indication of the testator's intention so to do, the duty of the court is to apply the rule. Farwell, J., when considering the question from the point of view which ignored the existence of the rule, found sufficient in the will to prevent the operation of what he said was the clear meaning of the words and, consequently, held that the legacies of £10,000 were given to the daughters of the testator's nephew Anthony born after the date of the will but before the death of the testator. This part of his decision strongly supports the opinion at which we have arrived that there is nothing in the testator's will to exclude the operation of the rule, and we are, therefore, of opinion that the rule applies to the present case, and that the appellant Camilla Audrey Bellville is not entitled to the legacy in question. For these reasons, we think the appeal fails and must be dismissed. We think that, in all the circumstances of the case, it will be proper to direct that the costs as between solicitor and client of all parties to the appeal be paid out of the testator's residuary estate.

Appeal dismissed. Costs of all parties out of the residuary estate.

Solicitors: *Forsyte, Kerman & Phillips* (for the appellant); *Withers & Co.* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

WHITE & CARTER, LTD. *v.* CARBIS BAY GARAGE, LTD.

[COURT OF APPEAL (MacKinnon, Luxmoore and du Parcq, L.JJ.), **June 24, 1941.**]

Emergency Legislation—Contract—Contract to display advertisements—Name and address of advertiser obliterated under Defence (General) Regulations, 1939*—Frustration—Defence (General) Regulations,* 1939*—Removal of Direction Signs Order,* 1940 (*S.R. & O.*, 1940, *No.* 1007).

The appellants were advertising contractors who by arrangement with the local authority had a right to display advertisements on litter receptacles which were attached to lamp-posts. The respondents were advertisers who contracted with the appellants for the display of certain advertisements. The respondents' advertisements were displayed for some time in accordance with the terms of the contract, but in Aug., 1940, the local authority, acting in pursuance of an order made under the Defence (General) Regulations, 1939, which required them to obliterate all place names, obliterated the name of the advertisers (whose name included a place name) and the name of the town from the advertisements, thus rendering them valueless to the respondents. The appellants contended that other suitable matter should have been supplied by the respondents :—

HELD : the contract was no longer capable of being performed in the manner contemplated by the parties at the time when it was entered into, and, therefore, the doctrine of frustration applied to it.

[**EDITORIAL NOTE.** It is not suggested that the decision herein involves any new principle of law, but it concerns a matter which must have affected many persons at the present time and is included for their information.

AS TO FRUSTRATION OF CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 215-220, paras. 296-298 ; and FOR CASES, see DIGEST, Vol. 12, pp. 386-404, Nos. 3172-3252.]

Case referred to :

(1) *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404 ; 12 Digest 372, *3095* ; 41 L.J.Q.B. 153 ; 26 L.T. 361.

APPEAL by the plaintiffs from an order of His Honour JUDGE SNAGGE sitting at the Westminster County Court, dated Apr. 7, 1941. The facts are fully set out in the judgment of MACKINNON, L.J.

B. MacKenna for the appellants.

W. H. Cartwright Sharp, K.C., and *W. B. Franklin* for the respondents.

MacKenna : This was a contract by which the appellants were to provide advertising space, and it was the duty of the respondents to provide advertising matter. This is not a contract which cannot be performed, because it is not a contract to display the words in question and no other words. It is possible for the respondents to implement the contract after the date on which the local authority took action, just as it is possible for them to do so before that date. The standards to which the bins were attached are owned by the local authority, who came under a duty to paint out the names by reason of an order, dated June 18, 1940, under the Defence (General) Regulations, 1939. The respondents had the right to provide other matter if the material they had already supplied became unsuitable. It does not follow that, because the appellants are precluded from exercising their rights under the contract, the respondents may not exercise the rights which they possess. The contract cannot be said to have been frustrated. It could have been performed by the respondents supplying other suitable advertising matter.

Counsel for the respondents were not called upon.

MacKinnon, L.J.: The plaintiffs, who are advertising contractors, have an arrangement with the local authority at St. Ives by which they have a right to display advertisements on certain rubbish bins attached to lamp-posts within the jurisdiction of that local authority. They made an agreement with the defendants by which the defendants took space for advertising. The contract is dated Apr. 24, 1939, and the material part of it is addressed to the plaintiffs by the defendants as follows:

> Subject to the conditions stated on this contract we agree to take advertising space [on 4 specified sites] for a period of 156 weeks . . . for which we agree to pay you 1*s.* per week per receptacle payable half-annually in advance.

The material conditions are that all advertising matter is subject to the approval of the plaintiffs, and, if not given with the order, must be given within one week after notice in writing. Otherwise, the plaintiffs are to have the right to exhibit the name, business and address of the advertiser, and to charge for the same. In the event of any interruption of the advertising, no deduction shall be made by the advertiser, but the contractors shall make it up to the advertiser. Should the contractors lose the advertising rights, the advertiser is to be charged on a *pro rata* basis. Then paras. 6 and 7 provide as follows:

> 6. The plaintiffs will use all reasonable care but cannot be held responsible for errors arising from faulty or indistinct copies . . . 7. In the event of the removal of any standard or post on which a plate is displayed, or in the event of the necessity to remove the advertisement for any reason whatever, the contractors have the right to arrange for a substitute which in their opinion is of equal advertising value.

The contract is a contract for the display of a form of words by way of advertisement. The form of words is to be supplied by the defendants. When the defendants have supplied the form of words and the plaintiffs have passed and exhibited them, the advertisement in that form of words becomes the advertisement to which the contract relates. The form of words supplied by the defendants and approved by the plaintiffs is in these terms:

> Carbis Bay Garage, Ltd.
> Repairs & Service
> Phone St. Ives 100.

That advertisement continued to be exhibited on the 4 stations until Aug., 1940. In June, 1940, an order made under the Defence (General) Regulations, 1939, empowered all local authorities to paint out the addresses in advertisements and public announcements. In accordance therewith, the local authority painted out the words "Carbis Bay" and "St. Ives" from the advertisements in question. All that remained visible afterwards were the not very illuminating words:

Garage, Ltd.
Repairs & Service
Phone 100.

In these circumstances, the question arose as to whether the defendants were any longer liable to pay in advance for the display of those un- A profitable words, with the result that this action was commenced. The plaintiffs' claim was for £20 16*s*., being two years' instalments due in advance, under the contract. It was pleaded by the defendants that performance of the contract became commercially impracticable, and that the agreement was frustrated. Also, by para. 8, the defendants, while B denying liability, paid into court the sum of £5 4*s*., being the amount due from Apr. 1, 1940, to Oct. 1, 1940, prior to the date of the prohibition order, and they said that that sum was more than sufficient to satisfy the plaintiffs' claim. Logically, the defendants ought to have paid in an amount up to Aug. 15, 1940, but they may not have troubled about the C period between Aug. 15, 1940, and Oct. 1, 1940. Unfortunately, there is no note of what the county court judge said, but he held that the sum of £5 4*s*. was sufficient to satisfy any claim which the plaintiffs had. It is quite clear from the form of the advertised words that, once the words have been supplied by the defendants and accepted by the plaintiffs, D the advertisement is the advertisement in that form of words. It is also clear that the advertisement in that form of words could not be displayed by the plaintiffs after Aug. 15,1940. The question then arises as to the effect upon the plaintiff's right to payment. I think that it is clear that cl. 2, which begins with the words "In the event of any E interruption in the display of the advertisement," relates to a temporary interruption, and that cl. 3 relates to a permanent interruption. The words of cl. 3 are:

> Should the contractors lose the advertising rights or from any cause whatever should the advertisement cease to be displayed, the advertiser is to be charged on a *pro rata* basis for the period during which the advertisement has been displayed.

F Clause 3 contemplated a permanent interference with the advertisement and a permanent inability of the plaintiff to display it any longer. I think that cl. 3 governs the matter. It must be borne in mind that as long ago as 1872 it was said by LUSH, J., in *Geipel* v. *Smith* (1), at p. **414**:

> . . . a state of war must be presumed to continue so long, and so to disturb the G commerce of merchants, as to defeat and destroy the object of a commercial adventure like this.

That is no doubt directed to the doctrine of frustration. I think that, when it was no longer possible to display the advertisement, there was a frustration of this contract. According to cl. 3, the advertiser was to be H liable only on a *pro rata* basis for the period during which the advertisement was displayed. One has not to consider whether there was frustration under the provisions of the implied terms. The question could be tested in this way. If, when the parties were making the agreement, a third party had said, "Supposing there is a war in which this country is involved, and as a result of that the government or the local authority insisted upon painting out all local names in advertisements wherever displayed with the result that your advertisement of the Carbis Bay Garage at St. Ives becomes futile and ridiculous with the words "Carbis Bay" and "St. Ives" painted out, what is to happen?" Both sides would have said: "Of course, in that case, the contract is at an end. The contractors can no longer display the advertisement and the advertisers can no longer be required to pay for it." Very likely they would have said: "Of course, that must be the result, but have we not really provided for it by cl. 3 of the contract?" I think that the case is a clear one, and, in spite of a very forceful and ingenious argument by counsel for the appellants, I think that the decision of the county court judge was right, and that this appeal must be dismissed with costs.

LUXMOORE, L.J.: I agree.

DU PARCQ, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *H. Flint & Co.* (for the appellants); *Hilder, Thompson & Dunn*, agents for *T. J. Chellew & Son*, St. Ives (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Distinguished. DUKE'S COURT EST-
ATES, LTD. *v.* ASSD. BRIT. ENGINEER-
ING, LTD. [1948] 2 All E.R. 137.

PINSON *v.* LLOYDS & NATIONAL PROVINCIAL FOREIGN BANK, LTD.

[COURT OF APPEAL (Scott and Goddard, L.JJ., and Stable, J.), **April 23, 24, 25, 28, May 9, 1941**.]

Practice—Pleading—Particulars—Traverse of negative allegation—Negative pregnant with an affirmative allegation—Evasive denial—Amendment—R.S.C., Ord. 19, *rr.* 7, 19.

The plaintiff sued the defendants alleging negligence in the purchase and sale of certain securities. The defendants by their defence, so far as material for the purposes of this case, denied that they had effected purchases or sales without having been authorised by the plaintiff to do so. The plaintiff thereupon asked for particulars of this paragraph of the defence. The defendants' counsel admitted that he was setting up an affirmative case that the defendants had had authority to effect the transactions in question:—

HELD: (i) the paragraph of the defence as it stood was evasive and must be amended by adding words to the effect that, if they did effect purchases on behalf of the plaintiff, they had her authority to do so.

(ii) [*per* GODDARD, L.J., and STABLE, J., SCOTT, L.J., holding that this point did not fall for decision on this appeal] while particulars cannot be ordered of a mere traverse, where the traverse is one of a negative allegation and the defendant admits he is setting up an affirmative case, particulars ought to be ordered. The defendant therefore was ordered to give particulars under the paragraph of his defence as amended.

[**EDITORIAL NOTE.** Where the allegation in the statement of claim is a negative one, a traverse of it in the defence must of necessity give rise to a double negative. This may or may not involve an affirmative allegation. If it does not, the defendant is precluded from setting up an affirmative case at the trial. If it does, he must give particulars of the affirmative case on which he relies. If the whole matter is left in doubt—that is to say, if it cannot be said whether it is a mere traverse involving no affirmative allegation or whether it is an affirmative allegation—then the pleading is embarrassing and must be struck out.

AS TO EVASIVE DENIALS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 275, 276, para. 465; and FOR CASES, see DIGEST, Pleading, pp. 191, 192, Nos. 1617-1621. See also YEARLY SUPREME COURT PRACTICE, p. 318.]

Cases referred to:

(1) *Bruce* v. *Odhams Press, Ltd.*, [1936] 1 K.B. 697; [1936] 1 All E.R. 287; Digest Supp.; 105 L.J.K.B. 318; 154 L.T. 423.

(2) *Philipps* v. *Philipps* (1878), 4 Q.B.D. 127; Digest, Pleading, 201, *1691*; 48 L.J.Q.B. 135; 39 L.T. 556; *subsequent proceedings* (1879), 40 L.T. 815.

(3) *Evans* v. *Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.

(4) *Weinberger* v. *Inglis*, [1918] 1 Ch. 133; Digest, Pleading, 200, *1684*; 87 L.J.Ch. 148; 118 L.T. 208.

(5) *La Radiotechnique* v. *Weinbaum*, [1928] 1 Ch. 1; Digest, Pleading, 191, *1619*; 97 L.J.Ch. 17; 137 L.T. 638.

(6) *MacLulich* v. *MacLulich*, [1920] P. 439; Digest, Pleading, 191, *1618*; 89 L.J.P. 242; 124 L.T. 66.

APPEAL by the plaintiff from an order of ATKINSON, J., dated Mar. 21, 1941. The facts are fully set out in the judgment of STABLE, J.

Gerald A. Gardiner for the appellant.

Valentine Holmes for the respondents.

SCOTT, L.J.: This appeal raises a question of some general importance about pleadings. The action is by a customer against a bank carrying on foreign as well as British business in respect of the buying and selling on her behalf of securities, gold sovereigns, dollars and francs, which acts, she alleges, were done negligently, or contrary to her instructions, or without her authority. As the foundation for her claim, she alleges that the primary business of the bank was not banking, but acting as brokers or agents for customers in the purchase or sale of securities. The plaintiff was, on July 31, 1940, the date when the writ was issued, and still is, resident and domiciled in France. She was English by birth, but is now the widow of a domiciled Frenchman.

The appeal is against an order of ATKINSON, J., dismissing an appeal from the master, who refused an application of the plaintiff either to strike out the defence or to order certain particulars. The particulars asked were:

> . . . of any authority which the defendants are alleged to have had from the plaintiff to carry out any of the transactions referred to in para. 7 of the statement of claim which the defendants were therein alleged to have carried out without such authority.

It appears from the statement of claim and from the letters therein referred to, copies of which were annexed to an affidavit by the plaintiff's solicitor, filed as evidence on which the court was asked to exercise its inherent jurisdiction to strike out the defence as an abuse of process, that the plaintiff had been a customer of the bank for some years, and throughout that time had been continually engaged in speculative transactions in currencies and other investments, the purchases and sales being carried out for her sometimes by her own brokers but more often by the bank's brokers. She appears to have had many different current accounts at the bank, gold, sterling, dollars, francs, and probably others. I am clearly of opinion that the plaintiff has not made out any case for striking out the defence on any one of the three grounds set out in her application, but, to the extent to which in her statement of claim she alleges a sale or purchase by the bank without her authority, the question whether the defendants discharge their whole duty under the rules of pleading by merely traversing the plaintiff's allegations or should in the defence make a positive statement of the facts on which it relies as conferring such authority is not easy to decide, for the following reasons.

It is a well-recognised canon of pleading that the defendant need not, and, indeed, ought not to plead to "particulars," whether contained in, or delivered with, the statement of claim. The reason for that canon is plain. All the material facts constituting the cause of action ought already to have been plainly stated in the pleading itself, as required by R.S.C., Ord. 19, r. 4, the plainest and most fundamental of all the rules of pleading. The proper function of "particulars" is not to state the material facts omitted from the statement of claim, in order, by filling the gaps, to make good an inherently bad pleading, however common that pernicious practice may have become. On this topic I made some observations in *Bruce* v. *Odhams Press, Ltd.* (1), at pp. 712, 713 ([1936] 1 All E.R., at p. 294), and will not repeat them beyond saying that I still hold the opinion that it is not the function of particulars to take the place of necessary averments in the pleading. Their function is to put the opposite party on his guard and prevent his being taken by surprise at the trial of an action, the "material facts" of which should have been already averred. Nor have mere statements of evidence, as such, a place in particulars, any more than in the pleading, although the dividing line between statements which contain sufficient indication to prepare the opponent's mind for what he will have to meet at the trial and mere statements of evidence is sometimes hard to draw, and should not invite meticulous criticism. The essential rules of modern pleading embody a common-sense view of litigation, and, if complied with substantially and in accordance with their real intention, are well-calculated to keep down the cost of litigation. No doubt it is often a question of degree and convenience whether details of material facts should be put into the body of the pleading or reserved for particulars, and this latitude is both preserved and limited by R.S.C., Ord. 19, rr. 6, 7. Insufficient instructions are no excuse for bad pleading. If a plaintiff does not, after advice, know whether or not he has a cause of action, and his pleader cannot discern one, the pleader is not for that reason entitled to plead badly, however much sympathy he may deserve for being called on to make bricks without straw.

With these considerations in mind, I pass to the plaintiff's pleading and particulars. From paras. 1, 3, 4, 6 and 7 of the statement of claim, it appears plainly that the action purports to be for damages for breach of three contractual duties in and about the sales and purchases of securities: (i) want of care and skill, (ii) disobedience to instructions, and (iii) buying and selling without authority. No other cause of action is set up, and it is specially to be noted that there is no claim for an account either under R.S.C., Ord. 15, or in equity by way of surcharging and falsifying the accounts rendered by the bank. Para. 7 as it stands, and without its eight pages of particulars, in my opinion, is bad, and could have been struck out for omission of the material facts necessary to make its indefinite allegations definite within r. 4. It is none the less so because it is possible to dig out of the particulars a very few instances of alleged sales and purchases where enough "material facts" are stated to make para. 7 a good pleading, if those statements are incorporated in it. Counsel for the respondents evidently took that view, and, in order to save costs, abstained from making an application under R.S.C., Ord. 19, r. 7, to strike out para. 7 or ask for a further and better statement of claim. That decision had its good points, although his application might well have succeeded, had he made it, as the classic decision of *Philipps* v. *Philipps* (2) shows. In that case, Bramwell, L.J., said, at p. 130:

> Then it is further said this mode of pleading is unavoidable. See what the effect of that argument is—that every pleading may be framed in an embarrassing way because the plaintiff may say peradventure it is unavoidable. It not only would be an answer to this particular case, but it would be an answer in every case.

Then Brett, L.J., said, at p. 132:

> I think it is embarrassing because, by a general statement, the plaintiff has prevented the defendants from demurring, and at the same time has omitted to state the facts which he ought to have stated, and the facts on which he will have to rely at the trial if he has any case.

He said, at p. 133:

> There are some tests which show practically what the rules mean. I think that in a pleading under the new rules such facts ought to be stated which, if a person had had to state a special case formerly for the opinion of the court, he would have stated in the special case as facts . . . If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings.

He added, at p. 135:

> I will deal with the case which the plaintiff's counsel says might exist, that the plaintiff might be really a person entitled to the possession, but does not know anything about the deeds which are in the possession of the other side.

He said, at p. 136:

> But if he has no such admission or evidence, and does not know what the deed is under which he is about to claim, that is, saying, in other words, that he does not

> know what his claim is. If he does not know what his claim is he has no right to make a statement of claim at all . . . I think that the omission of the facts and the insertion of the general statement made this pleading embarrassing, and on this ground this pleading ought to be struck out.

With regard to the particulars, counsel for the respondents relied, in his argument before us, on the canon that the defendants should not plead to the plaintiff's particulars. In addition, he made the separate point that the eight pages of particulars were so embarrassing as to afford an additional reason for the defendants' not pleading to them. However, what counsel for the respondents in fact did was to treat the particulars as if they were an integral part of the pleading—that is, of para. 7—and to deny all the allegations there made. His para. 4 is as follows :

> The defendants deny that they failed to act with reasonable skill and care or that they failed to carry out the plaintiff's instructions or that they effected purchases or sales without having been authorised by the plaintiff to do so either in respect to the matters alleged in the particulars of para. 7 of the statement of claim or at all. Each and every allegation contained in paras. 6, 7 and 8 of the statement of claim is denied.

In that paragraph, his traverse was probably intended to import a denial both of the plaintiff's allegation, contained partly in para. 7 and partly in the particulars, that the bank had bought or sold on the plaintiff's behalf and of the allegations that they had done so without her authority. However, to put himself right, he asked leave to add after the words "or at all" the further words "or that if they did so, they had the authority of the plaintiff," or words to that effect, and we permitted the amendment.

That the particulars were embarrassing both in form and in substance is obvious. Only a few of the sentences disclose material facts which support the first or second of the three general allegations of para. 7 and still fewer support the third—namely, that of purchasing or selling without authority—which is the only cause of action with which this appeal is concerned as its subject-matter. Even so, however, the allegations pleaded under that head are so mixed up on the one hand with irrelevant statements of evidence inadmissible in a pleading and on the other hand with causes of action not mentioned, or even hinted at, in the statement of claim—for instance, with regard to the "gold" transaction, charges of dishonesty, which could only be relevant if the plaintiff's action had been for fraud (or at least to surcharge and falsify the accounts)—that the particulars are doubly embarrassing. In view of that aspect of the position, and the resultant difficulty in which the plaintiff's pleader has put the defendants' pleader, I am not disposed to interfere with the exercise by the judge, affirming the master, of his discretion to refuse the plaintiff the order asked for—namely, that the defendants should give particulars of their authority from the plaintiff. So far as I can see, there are only two instances, or at the most three, where the plaintiff's rigmarole of particulars discloses a definite allegation of buying or selling without instructions. Lastly, the letters referred to in the statement of claim seem to me to indicate that the plaintiff knows more than she admits as to what case she has to meet.

The pure question of the law of pleading—which was discussed before us—whether, where a plaintiff charges his agent with having bought or sold without authority, a traverse by the defendant of the negative allegation of "no authority" is enough, or involves the so-called "negative pregnant," which imports a positive allegation by the defendant of which particulars can be asked, ought not, in my view, for the above reasons, to be treated as calling for decision on the present appeal. However, in arriving at the above conclusion, I have assumed that, where the statement of claim clearly and sufficiently alleges a sale or purchase without authority by a person purporting to act as agent, a defendant who merely traverses may be required *in his defence* to plead the material facts constituting such authority. I express no final opinion on this question, however, as I regard it as academic in the present appeal. In the circumstances of the present case, I see nothing so unjust in the judge's exercise of discretion as to bring the appeal within the principle explained by Lord Atkin in *Evans* v. *Bartlam* (3).

I think that the appeal should be dismissed with costs, though not without doubt after reading the judgments of Goddard, L.J., and Stable, J., for I recognise the strength of the detailed reasoning of the judgment of Stable J. However, the appeal will be allowed as they direct.

Goddard, L.J.: I have had the advantage of reading the judgment prepared by Stable, J., and I agree with it. However, as the court is not unanimous, I propose to state quite shortly my reasons for thinking that this appeal should be allowed and particulars ordered. As counsel for the respondents is willing to amend para. 4 of the defence, it is unnecessary to say more than that, as it stood unamended, it was, in my opinion, evasive, and contrary to R.S.C., Ord. 19, r. 19. The question then arises whether further particulars of that paragraph should be ordered. The application was resisted on the ground that, as it amounted to no more than a traverse of a negative averment, no particulars could be ordered. If it were intended to be no more than a bare traverse, I should agree with this contention, but the fundamental rule of pleading is that both a statement of claim and a defence must set out the material facts on which the party pleading intends to rely. Pleading the general issue by way of defence is no longer allowed, because such a plea gave no indication either to the opposite party or to the court what were the real issues which had to be determined. A bare traverse is a perfectly good plea, provided that all that is thereby intended is to put the plaintiff to proof of his case. It may be, however, that concealed in a traverse there is an affirmative case, and this may well be so when the traverse is of a negative averment. If it is clear to the court, either from the nature of the case or from the admission of counsel or otherwise, that it is intended to set up an affirmative case, so that the traverse is what has been described as a pregnant negative, then it seems to me that particulars of the affirmative case ought to be delivered. Otherwise, both the opposite party and the court will be in doubt as to what issues are to be determined at the trial.

In the present case, the plaintiff's advisers would not know from this defence whether they had to be prepared to meet a case that the defendants carried out some of the purchases or sales referred to in the particulars of the statement of claim under a general authority and others under a special authority, and, if the latter, whether from the plaintiff or from an agent alleged to be authorised by her, nor whether all or any of the authorisations were express or implied. If the pleading is not such as will fairly enable the opposite party to know the case he has to meet, further particulars ought to be ordered. I desire to add only two further observations. First, that the statement of claim may be open to criticism is no reason why the defendants should not set out the answer which they mean to set up at the trial. Though it may be said that the several matters of which the plaintiff complains should have been set out in separate paragraphs, it is, I think, clear enough what are the subject-matters of the plaintiff's allegations, and, if the defendants have an answer to them, I can see no reason why they should not say what it is. Then it is said that it is open to the plaintiff to obtain the information she requires by means of interrogatories. This means a multiplication of interlocutory proceedings, a matter which, in my opinion, should be discouraged whenever possible, because it tends to increase the cost of litigation. A defendant should state what his case is. He should not leave the plaintiff to find it out, if he can, by interrogating. I do not regard this as a case in which we are interfering with the exercise of discretion by the judge. From first to last, counsel for the respondents has argued on the footing that the question is one, not of discretion, but of right. I think that the appeal should be allowed, and, on the defendants submitting to amend para. 4 of the defence, that the order should be as proposed by Stable, J. The plaintiff should have costs here and in the court below in any event.

Stable, J.: The plaintiff in the action, who is the appellant here and in the court below, took out a summons asking, in substance, (i) to have the defence struck out unless amended, on the ground that it is an abuse of the process of the court, in that it traverses a number of allegations in the statement of claim which have already been admitted by the defendants in correspondence or elsewhere, and (ii) for particulars of one of the paragraphs of the defence.

As regards the application to strike out the defence on the ground that it traverses a number of facts alleged in the statement of claim which are not really in dispute, and which have been admitted by the defendants on earlier occasions, in my judgment, it is sufficient to say that, while there may be exceptional cases in which a defence can be struck out on this ground, such cases must be rare, and the remedy is available only where it is apparent that the defence is a frivolous or vexatious document, not designed or presented as a serious piece of pleading. In my judgment, that is not this case, and, speaking generally, I see no reason why a defendant is not entitled to put a plaintiff to the proof of his whole case, if so advised. It is a commonplace of pleading to put in issue a fact as to which there is no real dispute, in order to compel the plaintiff to call a particular witness to prove that fact, and so afford the defendant an opportunity to cross-examine the witness on other matters material to the case. This seems to me a legitimate and well-recognised method of pleading, and one which, on occasion, serves a useful purpose. If the appeal were confined to this point, in my judgment, it would fail.

As regards the application for particulars, this is resisted, on the grounds (i) that a defendant can never be compelled to give particulars of a traverse or denial, and that, where the allegation in the statement of claim is in the negative, as the traverse must involve a double negative, the existence of the double negative which is imposed on the pleader by the negative form in which the averment is set out in the statement of claim ought not to deprive a defendant of the benefit of the general rule, and (ii) that, by pleading as particulars matters which ought to have been pleaded as specific causes of action in the body of the statement of claim, the pleader has brought his troubles upon himself. As to the second objection, while I agree that a defendant is not compelled to plead to particulars, but is entitled to confine his defence to the allegations set out in the body of the statement of claim, I do not think that this question arises here. Without expressing any opinion as to the form of the statement of claim, or the sufficiency or otherwise of the particulars, I think that the plea of which particulars are sought is a traverse of an allegation set out in para. 7 in the body of the statement of claim that the defendants wrongfully, in breach of a term of their employment and in breach of an alleged duty, effected purchases and sales without having been authorised by the plaintiff to do so. The paragraph in the defence which we have to consider reads, so far as is material to the present appeal :

> The defendants deny that they effected purchases or sales without having been authorised by the plaintiff to do so.

The point of principle can, therefore, in my judgment, be decided without having regard to the particulars set out in the statement of claim. With the small modification that, as counsel for the appellant is only entitled to ask for particulars of a pleading which quite properly, and in accordance with the principle stated, deals solely with matters alleged in the body of the statement of claim, and not with matters independently introduced under the guise of particulars, I think his application should be limited to the only sort of " transactions "—namely, purchases and sales—which are referred to in the body of the statement of claim. If the plaintiff's particulars are embarrassing or insufficient, either on the ground that they say too much or that they say too little—and on this point I express no opinion, one way or the other—the defendants' remedy is to take the appropriate steps to have the particulars either pruned or enlarged, or both, as the situation demands. It is, in my judgment, no ground on which a defendant can refuse to give particulars of his defence to say that, even though the defence may not be in accordance with the rules of pleading, the statement of claim has fallen into a like or another error. It must be remembered that the function of a pleading is not simply for the benefit of the parties, but also—and, perhaps, primarily—for the assistance of the court, by defining with precision the area beyond which, without the leave of the court and the consequential amendment of the pleadings, the conflict must not be allowed to extend.

It remains, therefore, to consider whether or not, as it stands, the passage in the defence which I have set out is sufficient. To determine this question, it is necessary to consider the nature of a denial or traverse in a pleading. A traverse in a defence is never an assertion of fact on oath, and often is not an assertion of fact at all, but may amount to no more than : "Prove your allegation, if you can. I do not intend to give you any help by admitting it." Where the traverse is a mere denial or putting in issue of some positive or affirmative allegation in the statement of claim, the rule that a defendant cannot be ordered to give particulars really rests on the commonsense basis that there is nothing which the defendant can particularise, in which case there would be no point, to say the least of it, in ordering him to do something which *ex hypothesi* is impossible. Where the allegation in the statement of claim is a negative allegation, the traverse necessarily involves a double negative. When used in ordinary speech, a double negative must involve an affirmative proposition, but, where the double negative appears in a defence in the form of a denial of a negative allegation in the statement of claim, it does not necessarily follow, by reason of the very nature of a traverse which I have tried to indicate, that a positive or affirmative statement is contained in it. It may or may not be so.

A traverse involving a double negative may fall under one of three heads. First, it may be a mere traverse involving no affirmative allegation. Secondly, it may be a negative pregnant, which contains within the double negative an affirmative allegation. Thirdly, its true nature may be left in doubt. In my judgment, the defendant at the trial of the action can do no more than put the plaintiff to the proof of the negative alleged. He can seek to shake or destroy by cross- examination any evidence which the plaintiff may bring on the point, but, once the plaintiff has established a *prima facie* case, the defendant on such a pleading cannot, in my judgment, set up an affirmative case in answer, because, *ex hypothesi*, that would be to set up a case which he has not pleaded, which is what the rules expressly preclude him from doing.

If it falls under the second head, the double negative extends beyond a mere traverse, and amounts, as in the present case, to this : "If you establish a *prima facie* case that I sold or purchased shares for you, and that, in so doing, I acted without authority, then I intend to call evidence to establish that on each or some of the occasions there was an express authority to act as I did or an implied authority to be derived from certain facts." That, in my judgment, is to set up an affirmative case of which particulars ought to be given, and none the less so because the affirmative case is concealed, albeit imperfectly, in a negative shell. The third head may be excluded in the present case, because counsel for the respondents has told us that, at the trial of the action, if the pleading rests where it is, it is his intention to contend that he is entitled to set up an affirmative case, and to prove the existence of an express authority of which he refuses to give particulars.

In my judgment, in each case where a negative allegation by a plaintiff in a pleading is traversed in the defence, the question whether or not the defendant can be ordered to give particulars depends upon whether the traverse is a mere traverse or whether, though negative in form, the negative is pregnant with an affirmative, in which case particulars of such affirmative must be given. This result seems to be in accordance with the rules which govern these matters, with common sense, and with the authorities in which the importance of this distinction seems to me to be clearly recognised.

In *Weinberger* v. *Inglis* (4), particulars of a traverse involving a double negative were refused, on the grounds that the plea was a traverse and no more, and that the defendant sought to set up no affirmative case except one pleaded in a paragraph which was not under review, to the effect that they had acted *bona fide*. That was a case in which the plaintiff, who for many years before the refusal of the committee to re-elect him had been a member of the London Stock Exchange, brought an action against the committee for this refusal. The defence of the committee was simply that, under the rules of the Stock Exchange, by which the plaintiff was bound, the question of re-election was a matter to be determined by the committee, from whose decision, in the absence of *mala fides*, there was no appeal. In the material paragraph of the statement of claim, the plaintiff alleged that nothing had occurred since his first election to the London Stock Exchange in 1895, or then existed to render him ineligible for re-election. This paragraph the defendants traversed in their defence. It is clear, in my judgment, that, if concealed in the double negative the defendants had sought to embody an affirmative case that they had refused re-election because of some act of professional misconduct or something of the kind, particulars of that allegation would have been ordered : see the judgment of ASTBURY, J., at pp. 136, 137, 138, 139.

In *La Radiotechnique* v. *Weinbaum* (5), the plea of which particulars were sought and refused was a traverse of a negative allegation in the statement of claim, and so necessarily incorporated a double negative. Counsel made it plain, at p. 4, that the plea was a mere traverse, and contained nothing which involved any positive or affirmative allegation : see the judgment of Clauson, J., at pp. 6, 7. The last case which I think it necessary to mention is *MacLulich* v. *MacLulich* (6), a decision of the Court of Appeal affirming a decision of Sir Henry Duke, P. That was a case in which a wife instituted matrimonial proceedings against her husband for restitution of conjugal rights. The petitioner alleged that the respondent on a day named :

> . . . did withdraw from cohabitation with your petitioner, and has kept and continued away from her without any just cause whatsoever, and from thence hitherto has refused and still refuses to render her conjugal rights.

The respondent filed an answer with a paragraph containing these words:

> That he denies [on the day named] or on any other date he has without any just cause withdrawn from cohabitation or that he has refused or still refuses without reasonable cause to render to the petitioner conjugal rights as alleged . . . or at all.

In that case, once the wife proved that her husband had refused conjugal rights, she had *prima facie* established a matrimonial grievance. The burden did not lie on her in order to establish that grievance, to prove that she had done nothing to justify her husband in the action he had taken. It followed, therefore, that, if the husband's plea went beyond a mere denial of the refusal of conjugal rights, it must involve the affirmative proposition : "If I did refuse you conjugal rights, and you are able to prove a *prima facie* case of this, I say that I had good cause for so doing," Of this affirmative case, cloaked in the double negative, the husband was ordered to give particulars.

For these reasons, in my judgment, counsel for the defendants having admitted that the double negative in fact contains an affirmative case, the defendants must be ordered to give particulars of what it is. For the reasons I have stated earlier in this judgment, and which have been more fully stated in the judgment of Scott, L.J., I think that the particulars should be limited to the authority to carry out the purchases and sales alleged, and should not extend to particulars of the "transactions," a word which appears, not in the body of the statement of claim, but in the particulars. I will only add that, if counsel for the defendants had not made the admission he did, he would have been in no better plight, because he would have left the real nature of the traverse in doubt, in which case it would have been embarrassing. That part of the pleading, in such circumstances, would have been defective, in that the limits of the controversy would not have been properly defined in accordance with the Rules of the Supreme Court, and should, accordingly, in default of amendment, have been struck out.

Appeal allowed with costs in both courts.

Solicitors : *C. Grobel, Son & Co.* (for the appellant) ; *Linklaters & Paines* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

BANKU POLSKIEGO *v.* K. J. MALTER & CO.

[KING'S BENCH DIVISION (Tucker, J.), **June 24, 1941.**]

Bills of Exchange—Presentation for payment—Law governing presentation—Bill payable in Holland—Accepted generally in England—Bills of Exchange Act, 1882 (*c.* 61), *s.* 72 (2), (3).

The plaintiffs came from Poland with the Polish Government to this country, where they are now operating under licence. They were holders for value of five bills of exchange, drawn in England on May 1, 1939, in the following form : On Nov. 1, 1939, pay to our order against this bill of exchange the sum of Dutch florins twenty-two thousand, one hundred and forty. The bills were drawn by Luban-Wronki, payable in Amsterdam at the Twentsche Bank, and accepted by the defendants. They had not been paid, and the plaintiffs sued the defendants as acceptors of the bills. There had been no presentation for payment. The plaintiffs contended (i) that this was not a contract to be performed abroad and English law was applicable to it, and (ii) that the acceptance was a general one and presentation was not necessary to render the acceptors liable. The defendants contended that this was a contract the performance of which must take place abroad, and that Dutch law, which required presentation in order to render the acceptors liable, was applicable :—

HELD : the contract was not one which must be performed abroad. English law was, therefore, applicable, and no presentation was necessary to render the acceptor liable, the acceptance being a general one.

[**EDITORIAL NOTE.** The question here is whether, the acceptance of this bill being a general acceptance, payment must be made in Holland and not elsewhere. If that were so, the bill would be a contract which must be performed out of England, and, as to presentation for payment, would be subject to Dutch law. In the case of a general acceptance, however, the acceptor does not escape liability by reason of non-presentation for payment, and he is liable in an action here although the bill has not been presented for payment in Holland. The contract is, therefore, held not to be one which must be performed out of England and the matter is, therefore, governed by English law.

AS TO CONFLICT OF LAWS WITH REFERENCE TO BILLS OF EXCHANGE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 718-722, paras. 1004-1012 ; and FOR CASES, see DIGEST, Vol. 6, pp. 428-438, Nos. 2773-2819.]

ACTION on five bills of exchange for various amounts in Dutch florins. The facts are fully set out in the judgment.

H. G. Robertson for the plaintiffs.

A. T. Miller, K.C., and *Valentine Holmes* for the defendants.

TUCKER, J. : This is an action brought by the plaintiffs, who are the Banku Polskiego, against the defendants, K. J. Malter & Co., the plaintiffs suing as the holders for value of five bills of exchange for various amounts in Dutch florins. These bills were all drawn on May 1, 1939, and were payable on Nov. 1, 1939. They are all accepted by the defendants, and they are all in the same form. The first one is dated May 1, 1939, and is in these terms :

> On Nov. 1, 1939, pay to our order against this bill of exchange the sum of Dutch florins 22,140.

That is addressed to K. J. Malter & Co., Plantation House, Mincing Lane, London, E.C.3., payable in Amsterdam at the Twentsche Bank, and it is drawn by Luban-Wronki. That bill was accepted on behalf of Malter &

Co., and was subsequently indorsed by Luban-Wronki and by the Bank Rolny, who indorsed it to the Banku Polskiego. The defendants were called upon to pay these bills in Aug., 1940, and they were not paid. The plaintiffs sue the defendants as acceptors of the bills.

The plaintiffs, having left Poland with the Polish Government, eventually came to England, where they are now operating under licence. I mention that because there was a defence originally which stated, amongst other things :

> The said drawers are and have since Sept., 1939, been enemies within the meaning of the Trading with the Enemy Act, 1939, and payment of the said bills by the defendants is illegal in that it would be for the benefit of the said enemies and would discharge the obligation of the said enemies.

That point is now abandoned, it having been ascertained that this action is brought with the knowledge and consent of the appropriate authorities in England, and that the payment of these bills would not involve any infringement of the Trading with the Enemy Act, 1939. There was a further statement in the defence as follows :

> . . . the said bills were accepted by the defendants by way of payment for goods to be shipped to the defendants in the United Kingdom. The said goods were not shipped or delivered to the defendants.

It is agreed that that is an irrelevant consideration, having regard to the fact that the plaintiffs are to be regarded as holders for value of these bills, but the defence which is relied upon is contained in para. 3 of the defence, where it is stated as follows :

> Further by Dutch and/or English law presentment for payment of the said bills at the N.V. Twentsche Bank Amsterdam followed by protest in the event of non-payment is necessary in order to charge the defendants as acceptors. The said bills have not nor has any of them been so presented or protested.

It is common ground that the bills have not in fact been presented.

Counsel for the defendants says that the position is this. By English law, these are bills which were accepted in England, and, therefore, it is by English law that the contract contained in them is governed, and, the contract being one which is to be performed abroad, it is necessary to look at the law of the foreign country to see what the law of that country is in regard to performance. The law of Holland requires presentation to render an acceptor liable on bills such as these in the present case. Counsel for the plaintiffs, on the other hand, submits that Dutch law has nothing to do with this case, which is governed entirely by English law, a proposition which is to be found in the relevant sections of the Bills of Exchange Act, 1882. He referred me in the first place to sect. 19, which deals with general and qualified acceptances. That section provides :

> (1) An acceptance is either (*a*) general or (*b*) qualified. (2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. In particular an acceptance is qualified which is . . . (*c*) local, that is to say, an acceptance to pay only at a particular specified place. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere . . .

The emphasis there is on the word " only," and it follows from that that, if an acceptor accepts a bill payable at a named place, it none the less remains a general acceptance for the purpose of that section. It is only if he accepts expressly to pay at a specified place only, and not elsewhere, that it becomes a qualified acceptance. In this case, it is true that the acceptor simply accepts in general terms, and it is common ground in this case that in fact this is a general acceptance, but, in my view, the position A is exactly the same in this case as if the term with regard to the bill being payable in Amsterdam at the Twentsche Bank had been inserted by the acceptor as part of his acceptance. The position would then have been that it was none the less a general acceptance, because he had not specified that it should be payable there and there only.

B Then the next section, which counsel for the plaintiffs submitted has no real bearing on this case, but to which it is necessary to refer in order to understand the position with regard to these matters, is sect. 45, which provides as follows:

> Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

C Then sect. 52 (1) provides as follows:

> When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

If the matter remained there, it would be clear, I think, that it could be no defence to the defendants in this case to say that there had been no presentation, and, therefore, they are not liable. Counsel for the defendant, D however, refers me to sect. 72, which deals with the conflict of laws and provides as follows:

> Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows . . .

Those words apply to the bills in this case, and then there follow provisions E dealing with such matters as "requisites in form" and the stamp. Then in sect. 72 (2) these words appear:

> Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made . . .

Counsel for the defendants says that the contract has to be looked at in F order to find the law applicable, and, this contract having been made in England, English law is applicable. However, when English law is applied to it, it is found that in practice Dutch law applies, because, on looking at the contract, it is found that the place of performance is Amsterdam, and, therefore, by English law the requisites with regard to G the performance of a contract of this kind are to be governed by Dutch law. Then counsel for the defendants says that in subsect. (3) there are express provisions with regard to what is the law as to such matters as presentment for acceptance or payment. That subsection, which is still dealing with the bill referred to in the opening words of sect. 72, is as follows:

> The duties of the holder with respect to presentment for acceptance or payment H and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

Counsel for the defendants says that that must mean where the act is to be done, and here there is a bill the performance of which is required to take place in Holland. Presentation for payment has to be made there and is governed by the law of the place where it has to be made—namely, Holland. On the other hand, counsel for the plaintiffs submits that subsect. (3) has nothing to do with this case. He agrees that under subsect. (2) it is necessary to consider the English law applicable to a contract of this kind, and he says that, if, on looking at the contract, it is found that it has in fact to be performed in Holland, he would agree that Dutch law would govern the method of performance, but he says that the proper view of this contract is that it is not one the performance of which, as regards the acceptor, English law requires shall take place in Holland.

I have considered the arguments on both sides in this case, and I have come to the conclusion that the argument of counsel for the plaintiffs is right. The consequences in English law of the presentation are different with regard to an acceptor from those with regard to the other parties to a bill. In my view, having regard to the provisions as to general and qualified acceptance, it is not correct to say that, under bills of this kind, the acceptor is bound to perform his obligations under the contract by making payment in Holland. Though no doubt that is one of the methods by which the obligation can be performed, and presentation in Holland is to take place, and payment must take place in Holland, I think that, in English law, if none the less presentation does not takes place, the acceptor still remains liable under the bill. I come to the conclusion that this is not a case where one looks at the contract, which is admittedly governed by English law, and finds that the performance under that contract is to be carried out in a foreign country. On the contrary, it is a contract where it is not imperative, as regards the acceptor, that he should fulfil his obligations in that way. Therefore, I think that this contract is governed solely by English law, and by English law it is clear that the acceptor does not escape liability as the result of the non-presentation.

If counsel for the defendants were right on the first part of his case, it would be necessary for me to consider the difficult question which always arises when an English court has to pronounce as to what the law is in a foreign country when two experts in that law are not in agreement upon that matter. That is a pure matter of fact, and, in view of the decision I have reached that this case is governed by English law, I do not think it necessary for me to express any view on this conflict which prevails with regard to the Dutch law, and which, if I had to solve it, I confess I should find rather difficult on the material which I have before me at the present moment. In my view, this is governed by English law, and there must be judgment for the plaintiffs at the rate of exchange which existed on Nov. 1, 1939. There is no dispute between the parties as to what the rate of exchange prevailing at that date was. I think that the rate of exchange is more favourable than that which is actually asked for in the writ.

Judgment for the plaintiffs for £14,975 15*s*. 8*d*. *with interest at* 4 *per cent. from the date of maturity of the bills and costs.*

Solicitors: *Slaughter & May* (for the plaintiffs); *Herbert Smith & Co.* (for the defendants).

[*Reported by* **D. K. Belcher**, *Barrister-at-Law.*]

Applied. I.R. COMRS. *v.* SILVERTS, LTD. [1950] 2 All E.R. 271.

BRITISH AMERICAN TOBACCO CO., LTD. *v* INLAND REVENUE COMMISSIONERS.

INLAND REVENUE COMMISSIONERS *v.* F. A. CLARK & SON, LTD.

A [COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **June 18, 19, 30, 1941.**]

Revenue—National defence contribution—" Controlling interest " in company—Indirect control—Finance Act, 1937 (c. 54), *Sched. IV, paras.* 4, 7 (*b*), 11.

B In the first case, the appellant company held shares in 11 companies operating outside the United Kingdom, which were not, therefore, liable to be assessed to national defence contribution. In the case of 4 of these companies, the appellant company itself controlled more than 50 per cent. of the votes. In the case of the remaining 7 companies, more than 50 per cent. of the votes were controlled by the appellant company in conjunction with a company or companies in which the appellant company controlled more than 50 per cent. of the votes.

C In the second case, F.C.B.C. and F.H.B.C. were the sole directors of, and held all the issued shares in, an investment company. By reason of its shareholding in the appellant company, this company controlled the majority of the votes in the appellant company, in which F.C.B.C. and F.H.B.C. were also the only directors :—

D HELD : on the proper construction of the Finance Act, 1937, Sched. IV, paras. 4, 7 (*b*), 11, a "controlling interest" in a company includes an indirect, as well as a direct, controlling interest, and the appellant companies were, therefore, liable to national defence contribution in respect of dividends received from the controlled companies.

Decision of LAWRENCE, J. ([1941] 2 All E.R. 86) *affirmed.*

E [**EDITORIAL NOTE.** The problem as to what constitutes a "controlling interest" in a company within the meaning of the Finance Act, 1937, Sched. IV., paras. 4, 7 (*b*), 11, is one of considerable interest and importance to the business community. It was contended by the companies concerned that the term could not be held to include an indirect controlling interest in a company, on the principle *expressio unius est exclusio alterius*, and that, in certain other statutes where the F question of control is dealt with, the words "direct or indirect," or "directly or indirectly," are used where the legislature intended that the terms "control" or "controlling interest" should have a more extended meaning. Apt illustrations are provided by the Finance Act, 1920, s. 53 (2) (*b*), (*c*), and the Finance Act, 1936, s. 19 (1) (*a*), amending the Finance Act, 1922, s. 21 (6). It is held, however, that the word "interest" must be interpreted liberally, and that, when it is used with the word "controlling," it covers an indirect, as well as a direct, controlling interest.

G AS TO CONTROL OF COMPANY, see HALSBURY, Hailsham Edn., Vol. 17, pp. 89-92, para. 187, p. 290, para. 576 ; and FOR CASES, see DIGEST, Vol. 28, pp. 25-30, Nos. 136-154.]

Case referred to :

(1) *Noble (B. W.), Ltd.* v. *Inland Revenue Commissioners* (1926), 12 Tax Cas. 911.

H

APPEALS by the taxpayer from a judgment of LAWRENCE, J., dated Apr. 8, 1941, and reported [1941] 2 All E.R. 86, where the facts are fully set out.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellants in the first appeal.

F. Heyworth Talbot for the appellants in the second appeal.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents in both appeals.

Scott, L.J.: I will deal first with the appeal of the British American A
Tobacco Co. from a judgment of Lawrence, J., in regard to the measure of its liability to national defence contribution under the Finance Act, 1937. The operative provisions of Part III of that Act are these, in sect. 19:

> (1) There shall be charged, on the profits arising in each chargeable accounting B
> period falling within the five years beginning on Apr. 1, 1937, from any trade or business to which this section applies, a tax (to be called the national defence contribution) of an amount equal to 5 per cent. of those profits in a case where the trade or business is carried on by a body corporate and 4 per cent. of those profits in any other case. (2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom. C

Then Sched. IV provides as follows:

> 7. Income received from investments or other property shall be included in the profits in the cases and to the extent provided in this paragraph, and not otherwise . . . (*b*) in the case of any other trade or business, being a trade or business carried on by a body corporate, the profits shall include all income received by way of dividend or distribution of profits from any other body corporate in which the D
> first-mentioned body corporate has a controlling interest and which is not liable to be assessed to the national defence contribution . . .

The appellant company is a very large concern. It carries on business in the United Kingdom, and is, therefore, liable to pay national defence contribution on its profits, but it also possesses shares with voting power E
attached in each of eleven corporate bodies which carry on business outside the United Kingdom, some within the British Empire, some in foreign countries. These corporations, to which for convenience I will refer generally as the foreign corporations, are, therefore, themselves "not liable to be assessed to national defence contribution," for they fall F
within the concluding words of the part of the proviso which I have quoted. The Crown, however, contends that the company itself is liable to national defence contribution in respect of dividends received from all the 11 foreign corporations, because, says the Crown, it has a "controlling interest," direct or indirect, in each one of them, whether registered in G
its own name or in that of its nominees, partly by itself owning shares in the controlled companies, or partly by owning shares in intermediate foreign corporations over which it has *de facto* control, either direct or indirect, which in turn own shares in the controlled companies. The commissioners upheld that contention, and the judge in a short judgment H
upheld their conclusion, holding in effect that there was evidence to support the finding and that the commissioners had committed no error of law. I agree with his judgment, but, as the legal issue is one of general importance, it is perhaps better to state my reasons.

The whole appeal turns on the simple but far-reaching question of what the phrase "controlling interest" means in its context in Sched.

IV, para. 7. The company contends that "interest" necessarily means a proprietary interest in the foreign corporation owned by the British company, and that the phrase as a whole is not satisfied unless the control is achieved by means of a beneficial holding by the British company of the foreign corporation's shares registered in the name of itself, or its nominee, or by means of some other proprietary interest such as an option over shares. To such a control counsel for the company gave the name "direct," and contends that the statute excludes indirect control through another corporation, however complete the British company's effective control over its intermediary may be. He relied on the omission from the paragraph of any qualifying epithet attached to the phrase, such as "direct or indirect," and drew our attention to the presence of those words in the Finance Act, 1920, s. 53, which dealt with corporations profits tax. That section contains a proviso in subsect. (2) (*c*) as follows:

> . . . any deduction allowed in respect of the remuneration of any director, manager or other person concerned in the management of a company, who has a controlling interest in the company, whether directly or indirectly, and whether solely or jointly with any other persons shall not exceed an amount calculated at the rate of £1,000 per annum.

The object of that provision is plain. It was to prevent a person having a *de facto* control over the company's annual finance from debiting the company's profits with an annual payment to himself, which properly should be regarded as a distribution of profits when earned, as if it had been an expenditure incurred in earning those profits. The possibility of such persons exercising influence in many different and devious ways, or even endeavouring to conceal the fact of such exercise, seems to me sufficient to account for the elaboration and particularity of language there used. Therefore, I do not regard the use of that language in that context as having any relevant bearing, or as affording any sufficient argument for denying to the simpler words of Sched. IV, para. 7, their natural meaning. The OXFORD ENGLISH DICTIONARY contains two definitions, with illustrations, which appear to me to convey the natural meaning of the English verb "control" and of the English noun "interest" as used in the present context:

> Control . . . 4. To exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over; to dominate, command. (1809 Pinkney Trav. France 184 "Castles . . . built with the evident purpose of controlling . . . the navigation").
>
> Interest . . . 2. The relation of being concerned or affected in respect of advantage or detriment; especially an advantageous relation of this kind.

The commercial device of exercising company control through one or more intermediate corporations, British or foreign, was already well-known to Parliament in 1937, as was the financial economy in investment open to a company A desiring the control over a foreign operative corporation B if it interposed a holding corporation C between itself and corporation B and caused corporation C to acquire a share control in corporation B. Assuming the sufficiency of a 51 per cent. majority in each stage to give "control," company A could thus achieve control of corporation B at half the investment cost to itself of acquiring the direct share control of B, for, by the indirect method, 49 per cent. of the shares of both C and B would be paid for by others, whilst A's investment would be limited to 51 per cent. of the holding of company C. The commercial practice was and is really addressed to results rather than to means. Ownership by the controlling company of the control shares in the controlled company was irrelevant, and it was appropriate to choose, for expressing the relationship between controller and controlled, a word which had a wide meaning, and was not limited to that of a proprietary relationship. Had Parliament intended so to limit the provision to direct shareholding by the British controlling company liable to national defence contribution in the controlled corporation, that intention could easily and would naturally have been expressed by adding the word "proprietary." In the circumstances, I have no doubt that the Chancellor of the Exchequer, if I may personify Parliament in him, had no such intention, for he was concerned to bring within his net such part of the profits of controlled corporations carrying on business abroad as is in fact brought to England through this well-known system of company control exercised by controlling companies in England. An obvious fiscal gap had been discovered in the escape, actual or potential, of such profits from the tax-gatherer's net. If the appellant's arguments were accepted, the introduction of any intermediate holding company not carrying on business within the United Kingdom would at once re-open the sluices and let the Chancellor's fertilising water escape again. In dealing with the usual method of so-called "indirect" control, I have only taken for the purpose of illustration the case of one intermediate company, but the principle is the same if there are more links in the chain, as there are in several of the 11 foreign corporations affected by the appeal. The arithmetical economy is, of course, multiplied by each link, as the power of levers can be multiplied by repetition. In law, however, a point may be reached where the legal limit of remoteness may arrive through repetition of intermediate stages or other elaboration.

A subsidiary point was raised on behalf of the appellant company to the effect that a mere majority of shares (whether held directly or held indirectly within the method I have attempted to describe) is not enough to give the control contemplated by para. 7 (*b*). It was pointed out that, for various purposes both of the articles of association of the appellant company and of the constitutions of the 11 foreign corporations, a 75 per cent. majority is required, and it was argued that the statutory control is intended to be a complete control, and that, therefore, an appropriate mathematical adjustment must be made in the relations of the appellant company to each of the 11 foreign corporations before it can be ascertained whether, in the case of any one of the 11 foreign corporations, the appellant company has or has not control. The Attorney-General relied upon a decision of Rowlatt, J., in *Noble* v. *Inland Revenue Commissioners* (1) that the degree of control afforded by a 51 per cent. holding is control within the statute. Lawrence, J., took the same view, and so do I. I agree with the whole of his judgment. The commissioners were wrong in law, and the appeal must be dismissed with costs.

The appeal of F. A. Clark & Son, Ltd., was heard in both courts with the appeal of the British American Tobacco Co., Ltd., because it too depended on the meaning of the phrase " controlling interest," although the primary question there was whether the two sole directors of that company had such an interest in it as to bring them within the Finance Act, 1937, Sched. IV, paras. 4. 11, where the phrase is used. Para. 4 (*b*) forbids any deduction from the profits of a business carried on by a company of

> . . . any interest, annuity or other annual payment paid to any person carrying on the trade or business, or any royalty or rent so paid ; and, for the purpose of para. (*b*) of this proviso, where the trade or business is carried on by a company the directors whereof have a controlling interest therein, the directors shall be deemed to be carrying on the trade or business.

Para. 11 is a similar provision, limiting the remuneration of directors where they have a " controlling interest." The case was heard by different commissioners from those who heard the case of the British American Tobacco Co., Ltd., and they came to the conclusion that the two directors had not such a " controlling interest." However, there was no dispute about the facts, and the issue depended on a pure question of law. It is the same question as that in the case of the British American Tobacco Co., Ltd., except that the phrase " controlling interest " is applied to directors who control the company, instead of to one company controlling another. The judge could find no sufficient legal ground for giving the phrase one meaning in para. 7 and another in paras. 4 and 11, and we agree with him. In each case, the decision must depend on the meaning of the phrase. In my opinion, when standing alone in the context of any one of the three paragraphs, it contemplates such a relationship as brings about a control in fact, by whatever machinery or means that result is effected. This appeal, like the other, must be dismissed with costs.

CLAUSON, L.J. : I agree, and I have nothing to add.

GODDARD, L.J. : I agree.

Appeals dismissed with costs.

Solicitors : *D. M. Oppenheim* (for the appellants in the first appeal) ; *Richard Furber & Son* (for the appellants in the second appeal) ; *Solicitor of Inland Revenue* (for the respondents in both appeals).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WHITE v. WILLIAM PICKERSGILL & SONS, LTD.

[Court of Appeal (MacKinnon, Luxmoore and du Parcq, L.JJ.), **June 27, 1941.**]

Workmen's Compensation—Incapacity—Partial incapacity treated as total incapacity—Complete recovery from injury—Refusal of employers to employ man previously injured—Inability to obtain employment due to accident—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 9.

The appellants employed the respondent as a holder-up. The respondent was injured in an accident and for some time he received full compensation. He was afterwards certified as having completely recovered, and the appellants ceased to pay compensation. The respondent however, was unable to obtain employment at his former work, owing to the unwillingness of employers to employ as a holder-up a man who had had an accident. The respondent therefore claimed continuing compensation, and the county court judge made an award in his favour :—

Held : as the workman had been found to have entirely recovered from the effect of the accident, but was prevented from obtaining work because employers declined to employ a man who had previously had an accident in the particular employment, the inability to get work was not an incapacity to get work resulting from the previous injury.

French v. *Russell* (2) *followed.*

[**EDITORIAL NOTE.** The Court of Appeal have here followed the decision of the House of Lords in *French* v. *Archibald Russell, Ltd.* (2). It was sought to distinguish that decision on the ground that it applied only to cases of industrial disease, if not only to cases of miner's nystagmus. This contention has been rejected, and it is held that the decision of the House of Lords is not confined to cases of industrial disease, but is of general application in workmen's compensation cases.

As to Partial Incapacity Treated as Total, see HALSBURY, Hailsham Edn., Vol. 34, p. 919, para. 1262 ; and for Cases, see DIGEST, Vol. 34, pp. 395, 396, Nos. 3228-3234.]

Cases referred to :

(1) *Andrews* v. *Denaby & Cadeby Main Collieries, Ltd.*, [1935] 1 K.B. 484 ; Digest Supp. ; 104 L.J.K.B. 370 ; 152 L.T. 183 ; 27 B.W.C.C. 419.

(2) *French* v. *Archibald Russell, Ltd.* (1934), 104 L.J.P.C. 17 ; Digest Supp. ; 152 L.T. 1 ; 27 B.W.C.C. 338.

(3) *Ocean Coal Co.* v. *Davies*, [1927] A.C. 271 ; Digest Supp. ; 96 L.J.K.B. 364 ; 136 L.T. 449 ; 19 B.W.C.C. 429 ; *revsg.* (1926), 96 L.J.K.B. 255.

(4) *Ball* v. *Hunt (William) & Sons, Ltd.*, [1912] A.C. 496 ; 34 Digest 395, *3228* ; 81 L.J.K.B. 782 ; 106 L.T. 911 ; 5 B.W.C.C. 459.

(5) *Bywater* v. *Stothert & Pitt* (1932), 102 L.J.K.B. 1 ; Digest Supp. ; 148 L.T. 12 ; 25 B.W.C.C. 422.

Appeal by the respondent employers from an award of His Honour Judge Richardson, sitting at the Sunderland County Court, dated Mar. 12, 1941, and reported [1941] L.J.N.C.C.R. 104. The facts are fully set out in the judgment of MacKinnon, L.J.

J. Charlesworth for the appellants.

J. Harvey Robson for the respondent.

Charlesworth : The county court judge held that the workman was entitled to compensation, on the ground that he could not get employment because employers in shipyards on the Wear would not employ as a holder-up a man who had had an accident. If a workman has recovered from his injuries, he is no longer entitled to compensation, even if it is a fact that employers will not employ him at his former work after he has recovered from the accident. The fact that a man cannot obtain work in a shipyard is not a good ground for awarding him compensation. It seems to be stating a truism to say that compensation is payable only while the workman is incapacitated from working. In *Ocean Coal Co.* v. *Davies* (3), it was held in the House of Lords that compensation was not payable after incapacity had ceased. That raises the question of what is meant by incapacity. It means incapacity to do work. It includes inability to obtain work as the result of some physical defect by reason of an accident arising out of and in the course of the employment. *French* v. *Archibald Russell, Ltd.* (2) is as conclusive a case as one could have. The county court judge found that, because the man had had an injury, he could not get employment in other shipyards, and he found that that was an incapacity entitling the workman to compensation within the meaning of the Workmen's Compensation Act, 1925, s. 9 (1). There is no liability to pay compensation except during incapacity, and incapacity implies a physical injury. *Ball* v. *Hunt* (*William*) *& Sons, Ltd.* (4) was extended in *Bywater* v. *Stothert & Pitt* (5). In both those cases, the workman had to prove that there was some injury still remaining. There appears to be no authority for what the county court judge has decided in the present case.

Robson: *Ball* v. *Hunt* (*William*) *& Sons, Ltd.* (4) and *Bywater* v. *Stothert & Pitt* (5) show that the presence or absence of a physical defect is not the decisive factor. The Workmen's Compensation Act, 1925, is not concerned with disfigurement, except in so far as it prevents a man from earning wages. The belief of prospective employers as to a man's capabilities is the deciding factor. If, as a result of injuries arising out of the accident, prospective employers believe that the workman cannot do the work, the workman is suffering from an injury due to the accident. If a man is unable to obtain employment because employers believe he cannot do his former work owing to his having had an accident, the conclusion is irresistible that the incapacity is due to the injury the workman received. *French* v. *Archibald Russell, Ltd.* (2) and *Andrews* v. *Denaby & Cadeby Main Collieries, Ltd.* (1) are cases based upon the difficult situation which arises from nystagmus. In the present case, one has to consider the attitude of prospective employers in respect to a particular man and to a particular injury to that man at a particular time. If employers feel that a workman is incapacitated as a result of an injury arising out of and in the course of his employment, the workman is entitled to compensation, even though the belief of the employers is in conflict with medical opinion.

MacKinnon, L.J.: This is an appeal from a judgment of the county court judge at Sunderland in an arbitration under the Workmen's Compensation Act, 1925. The facts are these. The applicant had sustained injury by an accident when his elbow was damaged. That caused some septic gathering of the elbow, and he had to have operations and so forth, which made him incapable of work for a considerable time. Then there came a time when the doctor certified that he had partly recovered, and his compensation was diminished. Eventually, the doctor certified that he was entirely recovered, and was no longer incapacitated for work. Accordingly, the employers claimed to stop the compensation. The man then commenced proceedings under the Act, claiming that the compensation should be continued on the ground that he had not recovered. The medical evidence called was all one way. It was that he had entirely recovered and was just as capable physically of doing his work (which was that of holder-up in a shipyard) as he had been before the original accident. The county court judge found as a fact that he had recovered. In one place, he puts it thus:

> For the purposes of this case, I think that I must hold that he is probably recovered.

A little later, however, he leaves out the adverb:

> I do not think he can substantiate a claim under this subsection, for two reasons. First, he is recovered from his injury and not "so far recovered from the injury."

The facts as found by the county court judge were that, although the workman had recovered from his injury and, if he had gone to employers of the character of those who had previously employed him and they had taken him on, he would have been just as capable of doing the work as he ever was, employers of that class were unwilling to employ him because they knew that he had previously had this accident. His old employers, the appellants, for some reason or other had had to reduce their staff and did not want him. Then he went to another employer of the same type, Laings. The foreman said: "What is wrong with Pickersgills? Why have you not started with them? Have you not started with them since the accident?" When the workman said that he had not, the foreman said that he would not take the risk unless the workman had worked for Pickersgills again. What that comes to is that, although the county court judge found that the workman had physically recovered from his accident, yet the workman was unable to get work by reason of a disinclination on the part of employers of that class to give him work because of the fact that he had previously had this accident, either because they thought that he was the sort of man who was inclined to have accidents or because they doubted whether the verdict of the doctors in saying that he had recovered was really justified and suspected that he had not really fully recovered. However, I think that we must take this case as being, put quite shortly, that the man had in fact entirely recovered from any incapacity for work, but that he was unable to get work because of the prejudice created in the minds of prospective employers by the occurrence of this previous accident. Those being the circumstances, the county court judge has given him compensation on the ground that this inability to get work because of the prejudice of the prospective employers was a consequence of the injury sustained by reason of the accident. Counsel for the appellant employers says that that is wrong as a point of law, and that he ought to have dismissed the application. Upon the point of law, I confess that, as a matter of principle, I find it quite impossible to distinguish this case, on the facts which I have tried to indicate, from *Andrews* v. *Denaby & Cadeby Main Collieries, Ltd.* (1), decided by this court, and following upon the decision of the House of Lords in *French* v. *Archibald Russell, Ltd.* (2). In *French* v. *Archibald Russell, Ltd.* (2), a miner had an accident, as it is artificially called in these Acts, in that he had suffered from miner's nystagmus. He had entirely recovered, and was certified by all the doctors as having entirely recovered, but he found it impossible to get work again because the mine-owners generally had bound themselves by some sort of convention not to employ in their mines a man who had previously suffered from nystagmus, as a man who has once had nystagmus is more likely to suffer from it again. It was held in that case that, although this evil reputation from previously having had nystagmus prevented the workman from getting employment, that was not "incapacity for work" resulting from injury within the meaning of the Act. That case was followed in *Andrews* v. *Denaby & Cadeby Main Collieries, Ltd.* (1) in this court in 1935. The headnote is as follows:

> Where a workman, who has sufficiently recovered from an attack of miner's nystagmus to work again at the coal face, is prevented from obtaining employment solely owing to the policy of employers in refusing to employ a workman who cannot sign a declaration that he has never suffered from the disease, he is not entitled to compensation, for his inability to obtain work is not an "incapacity for work" which "results from the injury."

Applying that to this case, where this man has, as it is found, entirely recovered from the effect of his previous accident and from the incapacity for work resulting from that accident, but is prevented from obtaining work solely owing to the policy of employers in declining to employ a workman who has previously suffered from such an accident, I think that the principle of *Andrews* v. *Denaby & Cadeby Main Collieries, Ltd.* (1) compels me to hold that his inability to obtain work in this case is not an incapacity for work resulting from the previous injury. If that be so, it seems to me that counsel for the appellants is right in his argument that this decision on the part of the county court judge was erroneous, and that this appeal should be allowed.

Luxmoore, L.J.: I agree. It is with considerable regret that, like MacKinnon, L.J., I find the decisions in *French* v. *Archibald Russell, Ltd.* (2) and *Andrews* v. *Denaby & Cadeby Main Collieries, Ltd* (1) too strong for us. I find it quite impossible to distinguish those cases in principle from the present case, and, therefore, I think that this appeal must be allowed.

du Parcq, L.J.: I agree for the same reasons.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Crossman, Block & Co.*, agents for *Dees & Thompson*, Newcastle-upon-Tyne (for the appellants); *Robinson & Bradley*, agents for *Smirk & Thompson*, Newcastle-upon-Tyne (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

MINISTER OF AGRICULTURE AND FISHERIES *v.* PRICE.

[King's Bench Division (Viscount Caldecote, L.C.J., and Humphreys and Singleton, JJ.), **May 14, 1941.**]

Emergency Legislation—Agricultural land—Directions to cultivate—Non-compliance—Magistrates' power to consider merits of directions—Defence (General) Regulations, 1939 (*S.R. & O.*, 1939, *No.* 927), *regs.* 62, 66, 92.

In exercise of the functions delegated to them under the Defence (General) Regulations, 1939, reg. 66, a war agricultural executive committee gave directions to the respondent with regard to the cultivation of certain fields. The respondent failed to comply with the directions given and he was charged with non-compliance with the order. The magistrates took the view that, having regard to the subject-matter of the directions, the respondent's conduct was justified and they dismissed the charge against him:—

Held: the magistrates were not entitled to inquire into the merits of the directions of the war agricultural executive committee. The respondent having failed to comply with them, the magistrates were bound to convict him of an offence against the regulations.

[**EDITORIAL NOTE.** This case raises a short point with regard to the right of justices to inquire into the reasonableness of directions made by a war agricultural executive committee in pursuance of the powers delegated to them under reg. 66. It is held that justices have no jurisdiction to consider whether the direction is one which they themselves would have made in the circumstances. Their duty is to see whether the directions have been properly made and whether there has been failure to comply with them. If these two questions are answered affirmatively, they are bound to convict for an offence against the regulations without going into the merits of the directions.

For the Defence (General) Regulations, 1939, reg. 62, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1333; and see also BUTTERWORTH'S EMERGENCY LEGISLATION, Regulations [13] 73.]

Appeal by way of case stated from a decision of justices dismissing an information against the respondent. The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *W. J. K. Diplock* for the appellant.

The respondent did not appear and was not represented.

VISCOUNT CALDECOTE, L.C.J.: In this case, a case has been stated by magistrates who have dismissed a charge of non-compliance with an order given by a war agricultural executive committee under powers delegated to them by the Minister of Agriculture and Fisheries. The A Minister has power under the Defence (General) Regulations, 1939, reg. 62, to give directions by notice relating to the agricultural land specified therein served upon the persons by whom the directions are to be complied with. Reg. 66 enables the Minister of Agriculture to delegate to any person or body of persons appointed or approved by him his func- B tions under reg. 62, and, in accordance with these powers, a war agricultural executive committee gave a direction, dated July 24, 1940, to the respondent requiring the cultivation of field No. 35 in a manner described in the directions, and directing also field No. 41 to be dealt with by having the docks cut, gathered, burnt or otherwise destroyed. By reg. 92, any C person who fails to comply with any order made under any of these regulations is guilty of an offence under the regulations. In this case, the respondent failed to comply with the directions of the war agricultural executive committee, and, that fact being found by the special case, the question arises as to whether an offence had been committed. The D magistrates took the view that the directions were not the right directions. They based their decision to dismiss the charge upon the opinion which they held, in that respect differing from those whom they called the experts, who were witnesses called for the committee to prove the notice, the service of it, and so on.

E In my judgment, the only matter which the magistrates ought to have considered was, not the correctness of the view held by the agricultural committee, but the facts as to the giving of the directions and the failure of the respondent to comply with the directions. The directions were proved, and the failure to comply with them was proved, and, in my F opinion, an offence was committed. Therefore, the answer to the questions submitted to us should be, I think, that the offence was proved. The order which I think is the proper one is that the case should be remitted to the magistrates with an expression of the opinion of the court that an offence had been committed, and that is the order we G propose to make.

HUMPHREYS, J.: I agree.

SINGLETON, J.: I agree.

H

Solicitor: *A. D. Stocks*, Solicitor to the Ministry of Agriculture and Fisheries (for the appellant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Overruled. VESTEY'S EXECUTORS *v.* I.R.C. [1949] 1 All E.R. 1108.

GAUNT *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **June 27, 1941.**]

Income Tax—Disposition—Settlement—Power to declare new trusts—"'Wife" includes " widow "—Finance Act, 1938 (*c.* 46), *s.* 38.

By a settlement dated Mar. 10, 1938, the appellant assigned £100 to trustees and directed them to purchase certain shares. By cl. 2 (*a*) of the settlement, the income therefrom was to be accumulated and invested during his lifetime, and, by cl. 2 (*b*), after his death the trustees were to hold the trust fund subject to such trusts as he might by will or codicil declare. Clause 3 declared that neither he nor any wife of his should benefit from the trust during his lifetime. Clause 7 provided that he might appoint new trusts subject to the consent of certain persons, but this power was not to be exercisable in his favour or in favour of any wife of his. By a direction of the commissioners, part of the company's actual income was apportioned to the trustees under the Finance Act, 1922, s. 21. The Revenue contended that the amounts so apportioned should be treated as the appellant's income for the purposes of sur-tax under the Finance Act, 1938, s. 38, on the ground that under either cl. 2 or cl. 7 of the settlement he had power by will to benefit his wife after his death :—

HELD : the word " wife " in sect. 38 means " widow " as well as " wife," and, consequently, the fact that the settlor's widow might benefit after his death brought the settlement within the section.

Decision of LAWRENCE, J. ([1941] 2 All E.R. 82) *reversed on this point.*

[**EDITORIAL NOTE.** It will be remembered that under the Finance Act, 1922, s. 20 (1) it was possible by means of an appropriate settlement to " avoid income tax "—to use a short, if perhaps rather inaccurate, expression. In 1936, the legislature passed the first of two enactments designed to curtail this avoidance of tax. The Finance Act, 1936, s. 21, was directed solely to settlements in favour of unmarried infants—the most usual form of avoidance having been a settlement upon the infant children of the settlor. In 1938, the Finance Act, 1938, s. 38, was passed, and this was directed against settlements in favour of beneficiaries over 21 years of age or married. Both these sections contain highly complicated provisions and it has always been the view that their precise effect would only be known when the courts have construed settlements designed to avoid their provisions. It was contended by the Crown that the present settlement was within the provisions of sect. 38 of the 1938 Act, in that it contained a power of appointment whereby the settlor could by his will benefit his wife. In answer to this it was contended that, as the benefit to the wife could only accrue after the death of the settlor, it would not benefit his wife, but his widow. The Court of Appeal has held that, upon the proper construction of the section, " wife " includes " widow " and that, therefore, such a settlement is ineffective for the avoidance of tax, the income in question being treated as that of the settlor.

AS TO DISPOSITIONS OF INCOME INEFFECTIVE FOR PURPOSES OF TAXATION, see HALSBURY, Hailsham Edn., Vol. 17, pp. 268-270, paras. 538, 539 ; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575a-576e.]

APPEAL by the taxpayer and cross-appeal by the Crown from an order of LAWRENCE, J., dated Apr. 8, 1941, and reported [1941] 2 All E.R. 82, where the facts are fully set out.

Clause 7 of the settlement was in the following terms :

Notwithstanding anything hereinbefore contained the settlor may at any time or times hereafter by any deed or deeds revocable or irrevocable expressly referring to this power appoint such new or other trusts of and concerning the trust fund or any

> part or parts thereof (subject as hereinafter provided) as he may think fit provided always that such power shall not be exercisable (1) without the consent in writing of any one of the following persons [here follow four names] or of any other person (other than any wife of the settlor) nominated by the settlor in writing or (2) in favour of the settlor or of any wife of the settlor and it is hereby expressly agreed and declared that any such person whose consent may be asked as aforesaid may either give or withhold such consent as he or she in his or her absolute discretion may think fit and shall be fully entitled to give such consent notwithstanding that the intention with which the same is given is solely to benefit the settlor and any such consent so given shall be valid and effectual.

J. Millard Tucker, K.C., and *Frederick Grant* for the appellant.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

SCOTT, L.J.: The question raised by this appeal is whether the Finance Act, 1938, s. 38, brings certain income arising under a settlement by the settlor, Gerald Raynor Gaunt, within the net of income tax and sur-tax legislation. The short point upon which the case really turns is whether, in the language of sect. 38, where in relation to certain settlements the wife of the settlor is referred to, the word " wife " includes " widow." If the word " wife " is there to be read as including " widow " —that is to say, as applying to the wife after the death of the husband— it is conceded that certain income referred to in the case is subject to the terms of sect. 38. In my view, it would be wrong to limit the word " wife " as is suggested. In my opinion, it is obviously the meaning of the section that the word " wife " should extend to the case of " widow." That is the sole question in the appeal.

CLAUSON, L.J.: I entirely agree with SCOTT, L.J., but I will add a few words, because we are differing from the judge. I cannot do better than take the point as he states it in his judgment. The point we are dealing with here is that which is mentioned in the judge's judgment as the second question, which he states in this way ([1941] 2 All E.R., at p. 83):

> Secondly, does the power of the settlor, either under cl. 2 or under cl. 7, by will to benefit his wife after his death, bring the income of the trust fund within sect. 38 ?

He puts it in this way, at p. 84:

> Upon the second question, it was contended for the Crown that sect. 38 has regard to the person who is the settlor's wife at the time of the settlement, and that, if the settlement confers any benefit upon that person, whether she be wife or widow when the benefit is to be enjoyed, the settlement is within the section. For the respondent, it was contended that the word " wife " means " wife " and not " widow," and that, if the benefit of the settlement cannot be enjoyed until after she has ceased to be the settlor's wife, the settlement is not for that reason within the section.

That being the point, and those being the two contentions which were raised in the court below, before referring to the judge's judgment on the point, I should like to make one or two observations. The frame of the section is this. In the case of certain settlements, although, under the terms of the settlement, the income is no part of the income of the settlor, nevertheless, if the provisions of the settlement are such as to satisfy one or other of a number of criteria mentioned in the section, then, although the income is not the settlor's, and may never be the settlor's—in fact, he has nothing to do with it, beyond the fact that he is the settlor—as a purely artificial arrangement, he has to pay sur-tax as if it were his income.

When one comes to the criteria, one sees that they are directed to this. The legislature directs that it shall be investigated whether there is a possibility that, under the terms of the settlement, or of some settlement which may be substituted for it under some power of revocation, certain people—namely, the settlor or his wife—are or may be ultimately beneficially interested. I will read what the judge says, at p. 85:

> On the second point, I am of opinion that the object of the section is to prevent the settlor from getting the benefit of the trust fund during his lifetime. It is not to prevent his wife from enjoying the trust fund after his death, and I do not think that the word " wife " is apt to describe the settlor's widow. The income must be capable of being paid to, or for the benefit of, the wife, which, in my opinion, means while she is his wife.

Far be it from me to criticise meticulously the language of the judge, especially when dealing with such an extremely complex matter as this highly artificial series of subsections. All of us who have had to deal with matters of that kind are conscious of how easy it is to slip into some inaccuracy of language. Nevertheless, with all respect to the judge, I cannot help thinking that the conclusion to which he has come is coloured by the view which he has taken of the effect of the section upon the settlor's interest in the fund. Of course, that is not the point at all. The question is who are the people whose interests in the fund under the settlement, (or under a possible substitution for it under the power of revocation), are of such a character that the legislature thinks that a very remarkable result should ensue as regards taxability of income. When one realises that that is the point of it, there does not seem to be any sense in making the matter depend upon the possibility of a wife obtaining a benefit in her husband's lifetime. One does not see why, because the benefit which she is to get is to be after her husband's death, the position should be any different from what it is if the benefit is to be before her husband's death. The husband's death seems to have no relevance. *Prima facie*, therefore, one would suppose that the word " wife " means that which is its true natural meaning, a lady who, during the latter part of the joint lives of herself and a man, has been the wife of that man. That is the meaning of the word " wife." It is perfectly true that the word " widow " is used to express the position of a lady when her husband has died. In one sense, when a lady has become a widow, she is no longer a wife. That is perfectly true, but the description in this section of her as a wife refers to the lady, and has nothing to do with the matter of time. It is nothing to do with whether one is talking of her as being a lady who is living at the same time as her husband or as being a lady who has survived her husband. Accordingly, the difference, if difference there be for this purpose, between the words " wife " and " widow " is quite immaterial for the purposes of the section. Why, in those circumstances, when a lady is referred to as the wife of a particular man, it should be supposed that she ceases to hold the character indicated by that reference the moment her husband dies, I must confess I cannot understand. I should have thought that it was perfectly clear that, when the settlement refers to the possibility of the settlor's wife obtaining a benefit, it refers to the possibility of her obtaining a benefit either during the husband's lifetime or afterwards, and it would be curious if it meant anything else. For these reasons, I am quite unable to accept the view of the judge on this point. It appears to me that on this part of the case his judgment is wrong, and that he should have decided the point the other way. The net result of that will be, as I understand it, that his judgment will be supported, because he decided in favour of the Crown, though on another point, with which, in the view we take of this point, it is not necessary for us to deal. I think that that has put the position correctly.

GODDARD, L.J.: I agree. What we have to consider is whether the property comprised in this settlement may become payable to, or be applicable to the benefit of, the wife of the settlor in any circumstances whatsoever. One of the circumstances in which it may become payable or applicable to the wife is on the death of her husband. It seems to me clear that the word "wife" in this case includes "widow." I agree with the judgment which has just been delivered by CLAUSON, L.J.

Appeal dismissed with costs.

Solicitors: *Ashurst, Morris, Crisp & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

STUART *v.* ANDERSON AND MORRISON.

[KING'S BENCH DIVISION (Tucker, J.), **June 25, 26, 1941.**]

Emergency Legislation—Imprisonment under defence regulation—Person of hostile associations—False imprisonment—Validity of order—Order made in respect of a number of persons—Jurisdiction of court to review order—Defence (General) Regulations, reg. 18B.

The plaintiff was detained under the Defence (General) Regulations, reg. 18B, and claimed damages for false imprisonment on the ground that his detention was illegal. He complained in the first place that the order detaining him was bad on the face of it, because it ordered the detention of a number of persons whose names were set out in a schedule. In the second place, he complained that there was no reasonable cause to believe that he was a person against whom an order for detention could properly be made under the regulation:—

HELD: (i) the order was not invalid by reason of the fact that it ordered the detention of a number of persons.

(ii) the court has no jurisdiction to inquire into the merits of the case except to satisfy itself that the Home Secretary has applied his mind to the necessary matters set out in the regulation and has so applied his mind in relation to the particular case of the plaintiff.

[**EDITORIAL NOTE.** The jurisdiction of this court in a case of this kind is certainly not an appellate jurisdiction to hear the case as on an appeal from the decision of the Home Secretary. If it is shown that the Home Secretary has followed the procedure laid down by the regulation and has *bona fide* made an order for detention in the belief that the necessary grounds as stated in the order existed for the detention of the person detained, then there is nothing of which complaint can be made in the courts.

For the Law on the Subject, see HALSBURY, Hailsham Edn., Vol. 6, p. 533, para. 662 ; and for Cases, see DIGEST, Vol. 11, p. 552, Nos. 538-543.]

Cases referred to :

(1) *Liversidge* v. *Anderson and Morrison*, [1941] 2 All E.R. 612 ; Digest Supp.
(2) *R.* v. *Home Secretary, Ex p. Lees*, [1941] 1 K.B. 72 ; Digest Supp.
(3) *R.* v. *Home Secretary, Ex p. Budd* (1941), *The Times*, June 11, July 3.

Action for damages for false imprisonment. The facts are fully set out in the judgment.

F. W. Wallace and *J. W. Williamson* for the plaintiff.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the defendants.

Tucker, J. : This is an action brought by the plaintiff, John Roland Smeaton Stuart, against Sir John Anderson and Mr. Herbert Morrison as defendants, the two defendants being sued by reason of the fact that each was, during part of the time covered by the matters complained of, the Home Secretary. The action is one in which the plaintiff claims damages for false imprisonment.

The statement of claim as amended alleges that, on May 30, 1940, the first-named defendant, purporting to act under the Defence (General) Regulations, reg. 18B, made an order concerning the plaintiff. Then it sets out the order. Then it goes on in para. 3 as follows :

> On the same day, Sir Alexander M. Maxwell, Under-Secretary of State for the Home Department purporting to act in pursuance of the aforesaid order made the following order . . .

Then it sets out a document which was signed by Sir Alexander Maxwell. It then alleges :

> In purported pursuance of the detention order referred to in the first paragraph hereof or alternatively in purported pursuance of the order referred to in the third paragraph hereof the first defendant on June 4, 1940, caused the plaintiff to be arrested by police officers and to be detained.

Then it sets out the period of his detention—namely, from June 4 until Nov. 15, when he was released. Then it goes on to allege that on Oct. 9, 1940—although we now know that that date was in fact Nov. 9, 1940—an order was made by the then Home Secretary revoking the detention order, and another order was made on the same date in pursuance of the Defence (General) Regulations, reg. 18A, restricting the movement of the plaintiff after his discharge from detention. The statement of claim ends as follows:

> The said making of the detention order, the said arrest, the said detention, as from the said June 4, alternatively from the said Oct. 9, were wrongful and were made by the defendants respectively as aforesaid without lawful justification.

A The defence sets out in para. 1:

> Save that the first defendant not only purported to act under the alleged regulation in making the alleged order but did so act, paras. 1 and 2 of the amended statement of claim are admitted.

The defence admits that Sir Alexander Maxwell signed and issued the B document set out in para. 3 of the statement of claim. Then it states:

> On June 4, 1940, the plaintiff was arrested by police officers and detained in pursuance of the detention order referred to in para. 1 of the amended statement of claim and he was thereafter detained in pursuance of the said detention order until Nov. 15, 1940, at the places alleged.

Then the making of the revocation order and the order restricting the C plaintiff's movements is admitted. Otherwise, no admission is made with regard to any allegations in the statement of claim.

Thereafter the plaintiff was asked to give particulars of his statement of claim, and he delivered particulars under para. 6 as follows:

> The making of the detention order was wrongful and made by the first-named D defendant without lawful justification because . . .

He then set out a number of reasons, to which I will refer later, for saying that the detention order was made without lawful justification.

The Court of Appeal has recently had before it the question of onus of proof in a case of this kind in *Liversidge* v. *Anderson and Morrison* (1). That E was an interlocutory appeal to the Court of Appeal against an order refusing to strike out a paragraph in the pleadings or to order further particulars thereof, and the court stated the position in these words:

> The object of the application, in either form, is clearly designed to raise at this early and interlocutory stage of the proceedings a crucial question as to the onus of proof. If, in answer to the plaintiff's claim, it will be necessary for the defendants F to prove, not only that the detention order was in form validly issued pursuant to the regulation, but also (*a*) the various facts which justified the first defendant in making such an order, and (*b*) that he had a reasonable and honest belief that it was necessary to make that order, then it may well be that the plaintiff might, in the discretion of the court, be entitled to such particulars as he asks for. However, the plaintiff can only have any such right to particulars if the onus is, as we have set forth, upon the defendants. If at the trial the plaintiff merely proved that he was G detained in prison by an order of the first defendant and nothing more, and if the defendants then proved that he was detained by an order issued pursuant to the regulations, and signed by the first defendant (assuming that this was not admitted by the plaintiff), and if that was the whole of the evidence, we think there must be judgment for the defendants.

The position in this case as it stands now is this. An order has been H produced, signed by the Home Secretary, purporting to have been made under reg. 18B, and it is now admitted that that order was in fact signed by Sir John Anderson, so that, if the matter rested there, the case would stand in the exact position indicated by the Court of Appeal, and judgment would have to be given for the defendants. Counsel for the plaintiff recognises that that is so, but he says that he has established matters which shift the onus back upon the defendants.

There is one other matter to which I should refer in dealing with this aspect of the case. The point appeared to me to have been taken at one time that the mere production of an order in the form of this order of May 30, 1940, signed by the Home Secretary, would not be a sufficient fulfilment of the requirements stated in the judgment of the A Court of Appeal, because this order is bad in form, as it omits to recite one of the essential requirements for the making of an order under reg. 18B (1A)—namely, that it is necessary to exercise control over the person in question. During his final argument, however, counsel for the plaintiff told me that he did not desire to contend that this order was bad on its B face for that reason, but desired only to make use of that point in support of another argument which he advanced. He did, however, submit that this order is bad on the face of it for another reason, and I think it is necessary to deal with that point now, because, if the Home Secretary produced an order which is bad on the face of it for any reason, it would C follow that he had not sufficiently discharged any onus which there might be upon him to the extent indicated in that judgment of the Court of Appeal. I am assuming, without deciding, that, on the pleadings in this form, there would be some onus on the defendants to produce a document which was valid on the face of it. D

By an amendment made during the trial, the plaintiff obtained leave from me to add to his particulars this allegation in support of his claim of illegality :

> That the said order was on its face a general order in which a series of alternative allegations was made against more than 350 persons and was not directed to the particular case of the plaintiff. E

It is true that this order is in this form :

> Whereas I have reasonable cause to believe the persons named in the schedule to this order to have been or to be members of, or to have been or to be active in the furtherance of the objects of, an organisation as respects which I am satisfied, (*a*) that the persons in control of the organisation have or have had association with persons concerned in the government of, or sympathies with the system of the government of, F a power with which His Majesty is at war, and (*b*) that there is danger of the utilisation of the organisation for purposes prejudicial to the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of a war in which His Majesty is engaged or the maintenance of supplies or services essential to the life of the community. Now, therefore, in pursuance of the powers conferred on me by the Defence (General) Regulations, 1939, reg. 18B, I direct by this my order, that each of the persons named in the said schedule shall be detained . . .

Then there is set out a number of names in the schedule to the order, G which I have reason to believe contains some 344 names.

It is said that an order in that form is bad on the face of it. With regard to that, I am unable to find that in reg. 18B there is any provision which requires an order made under that regulation to be in any specific form. Moreover, this matter was considered in *Ex p. Lees* (2), and in the H judgment of the Divisional Court, which was approved by the Court of Appeal, dealing with an objection to the order on the ground that it was bad on its face, these words appear. Having cited the order, the judgment proceeds at p. 78 :

> The order, therefore, follows strictly the language of the regulation. It is argued that the order is bad for duplicity.

I need not go on to deal with that. The court said that, in their opinion, there was nothing in that point :

> The document in question is not a conviction nor an indictment, nor even a charge. We find nothing in the statute or the regulations requiring that the order should be in any particular form, and, in our judgment, the order is not invalid upon this ground.

It is quite true that a different objection was taken there—namely, to the alternative nature of the allegations—and there was no question about the order applying to a number of people whose names are set out in the schedule, but, as I am unable to find anything in the regulations requiring the order to be in any particular form, I feel it quite impossible to say that, because the order applies to a number of people whose names are set out in the schedule, that must make the order bad on the face of it. I reject that contention, and hold that the production of an order of this kind, admitted to be signed by the Home Secretary, shifts on to the plaintiff the onus of showing that that order is invalid for some assigned reason.

Accepting that onus which lies upon him, counsel for the plaintiff states that the order is bad for several different reasons. His main point is that he has proved a *prima facie* case to establish the proposition that the order has been made without the Home Secretary having any reasonable belief that it was necessary to exercise control over this plaintiff. In opening his case, counsel for the plaintiff said : " The defendants must establish that they had reasonable justification for depriving the plaintiff of his liberty. The defendants must satisfy the court that they in fact had reasonable cause." That is really the main basis of the case for the plaintiff, and I think that all the points other than the point dealing with the omnibus nature of the order in question can be brought under that heading.

I think that it is necessary, before dealing further with this case, to remember the origin of reg. 18B, and to consider the function of the court in dealing with a case of this kind. Reg. 18B, which includes, of course, reg. 18B (1A), was made pursuant to the powers conferred upon His Majesty in Council by the Emergency Powers (Defence) Act, 1939, which provides in sect. 1 (2) (*a*) as follows :

> [His Majesty in Council may] make provision for the apprehension, trial and punishment of persons offending against the regulations and for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm.

Pursuant to these powers, reg. 18B (1A), with which we are now dealing, was made in May, 1940. I think that it is very important to bear in mind the state of affairs which prevailed in May, 1940, when this regulation was made. The regulation is in these words :

> If the Secretary of State has reasonable cause to believe any person to have been or to be a member of, or to have been or to be active in the furtherance of the objects of, any such organisation as is hereinafter mentioned, and that it is necessary to exercise control over him, he may make an order against that person directing that he be detained.
>
> The organisations hereinbefore referred to are any organisation as respects which the Secretary of State is satisfied that . . .

Then the regulation proceeds to set out the matters with respect to which the Secretary of State must be satisfied as regards any particular organisation, and I need not read those words. Then the regulation proceeds to set out other things which are required to be done, and to confer certain rights upon detained persons (for instance, the right to put their case before an advisory committee and so forth), and the final subparagraph of this regulation is subpara. 8, which provides as follows :

> Any person detained in pursuance of this regulation shall be deemed to be in lawful custody and shall be detained in such place as may be authorised by the Secretary of State and in accordance with instructions issued by him.

It is quite clear, of course, that, when that regulation was made—and it is not argued that this regualtion is not *intra vires* the Emergency Powers (Defence) Act, 1939—those persons who made this regulation had to consider to whom they were going to entrust this very difficult and troublesome matter, and they decided, as is clear from the regulation, that the person to make the decision in these matters was not to be one of His Majesty's judges. It was not to be any *ad hoc* tribunal set up for the purpose, but it was to be the Home Secretary, and the Home Secretary alone. It also makes it clear, I think—and in fact it has been so held by the courts—that the court has no jurisdiction to sit as an appellate tribunal upon any decision to which the Home Secretary has come, much less has the court any power to try any such case itself in order to see whether it would have come to the same conclusion if the legislature, or those having powers to legislate, had entrusted this matter to a judge. None the less, the court, at any rate exercising its powers of *habeas corpus*, has power, as has been clearly laid down in cases which have arisen under this regulation, to see that the powers conferred upon the Home Secretary have been rightly exercised under this regulation, and to ensure that the powers conferred upon him have been exercised honestly and *bona fide*, and not merely under some pretence of using the regulation for the purpose of detaining some person on some other grounds altogether. Similarly, complaints would no doubt be properly made if a person were detained who was not the person aimed at by the order made by the Home Secretary—that is to say, if a different man altogether were being detained. Similarly, also, there have been cases where it has been held—or, at any rate, there has been one case where it has been held—that the detention was unlawful and illegal because the Home Secretary had not at all stages of the proceedings adhered to the procedure and the necessary requirements laid down by this code which governs his powers in the matter.

However, it is now sought in this action, in my view, to go beyond that, and to invite the court to say that the court may inquire into a particular case on its merits and ascertain whether or not there was in fact a reasonable cause to detain the plaintiff in this case. In my view, I have no jurisdiction to embark upon any such inquiry at all. I think that the plaintiff has to satisfy me that this order has been wrongfully and illegally made on one of the grounds which I have indicated, with the addition that, if he can satisfy me that this order has been made by the Home Secretary without the Home Secretary ever having applied his mind to one of the essential matters, then, I think, he will have established his case and be entitled to damages. I think that he has to go as far as that, and I do not think that what I have said in any way conflicts with anything in the judgment in *R.* v. *Home Secretary, Ex p. Lees* (2), when one considers that judgment as a whole and what the court was in fact dealing with, and considers that case in conjunction with *Liversidge* v. *Anderson and Morrison* (1), also decided in the Court of Appeal.

Accordingly, I direct my attention in this case to see whether counsel for the plaintiff has made out such a case. The matters upon which he relies are, first of all: "I put before you a man of blameless character and excellent past, a man who served in the last war, and against whom nobody has ever made any complaint at all, a man who admittedly joined the British Union in 1934, but who left it in 1937, a man whom I put into the witness-box, and whom you have seen. Furthermore, there are certain matters in this case upon which I rely in support of this contention—namely, the fact that the Home Secretary has never really directed his mind to this point at all." Then he says that there is this omnibus order, which is an order which does not in terms recite that the Home Secretary is satisfied that it is necessary to exercise control over this particular man. He says that that tends to show that this matter was dealt with in a general kind of way, and that the Home Secretary appears to have thought that it was sufficient to show that a person had had some connection with an organisation of this kind in order to justify a detention order being made, without his having to consider whether it was necessary with regard to each particular case to exercise control. That is the omnibus nature of the order and the absence of recital in it.

Furthermore, he says that the fact that this precise order, or a copy of it, was not served upon the defendants, coupled with the facts that the order which was served upon the defendants was signed by Sir Alexander Maxwell, the Under Secretary, and that that order does contain a recital as follows: "Whereas the Secretary of State has reasonable cause to believe that it is necessary to exercise control over you," and because of that discrepancy between the document actually served upon the plaintiff and the terms of the actual order made by Sir John Anderson, supports his case to the effect that he has at any rate made out a *prima facie* case to show that this matter did not receive consideration. He also suggested that this document, signed by Sir Alexander Maxwell, helped him to argue that the Home Secretary had not considered this matter at all, but had apparently delegated the whole question to Sir Alexander Maxwell. I find it quite impossible to draw that inference. The document was in fact signed by Sir Alexander Maxwell, but it recites that the Secretary of State has reasonable cause to believe the various things set out therein, and I can find no reason to doubt from this document, or from this document coupled with any of the other matters in this case, that the Home Secretary did in fact apply his mind to this essential matter, although the actual order originally signed by him did not contain those words.

Then counsel for the plaintiff says that there is another matter which helps to support his case of illegality, and that is the delay which has occurred in this case. That is set out in his particulars. He says that this detention was continued after June 7—the day on which the plaintiff had made representations in writing to the Home Secretary, as he was entitled to do—notwithstanding the receipt of those representations which set out the true facts. Then it was said that the detention continued notwithstanding that the honorary solicitor to the ratepayers' association of Thorpe St. Andrew in the county of Norfolk had also made representations to the Home Secretary. The detention was further continued, and the defendants did not before Aug. 29 communicate to the plaintiff the reasons alleged for his detention This again involved an unreasonable period of time. That date—namely, Aug. 29—was the date upon which the defendant was given the precise notice with regard to the grounds upon which the order had been made which is required to be given to him under reg. 18B before his case is heard by the Secretary of State, and the notice given to him was in these words:

> The order under defence reg. 18B was made against you, John Roland Smeaton Stuart for the following reasons: (1) The Secretary of State has reasonable cause to believe that you have been a member of the organisation now known as British Union; or have been active in the furtherance of its objects; and that it is necessary to exercise control over you. Particulars. You, John Roland Smeaton Stuart were a member of the B.U. until 1938 and have been, and were, up to the time of your arrest, active in the furtherance of the objects of the said organisation by propounding in public speech and writings Fascist doctrines and by disseminating pro-German and pacifist sentiments.

It is said that there was further delay after the receipt of those grounds until the committee actually heard his case on Sept. 10, 1940. It is said that the committee gave their decision on Oct. 15, 1940, and that the revocation order was not made until Nov. 9, 1940. It is said that there has been a great deal of delay here, and that that renders, or helps to render, the detention illegal. I find myself unable to accept that proposition. I do not think that it is for me to decide whether there was more delay than was necessary in this particular case. I find it quite impossible to come to any decision on that matter on the facts before me. One has to take into consideration the circumstances which were prevailing at that time. I am by no means satisfied, on the facts before me, that there was undue delay, or that, if there was any undue delay, it was in a matter which can be brought home as the personal responsibility of the Home Secretary, nor am I satisfied that, if there was undue delay of the kind indicated here, it would be a ground for holding that the detention order was bad so as to enable the plaintiff to recover damages, or, even although the original order might be good, the detention became bad from some later date by reason of this delay. I reject those contentions.

Therefore, I return to what counsel for the plaintiff really puts in the forefront of his case—namely, the question whether he has made out a *prima facie* case for showing that the Home Secretary had not directed his attention to this point. With regard to that, I have to consider the
A matters upon which he relies, and, amongst the matters upon which he relies, it must not be forgotten that the document signed by Sir Alexander Maxwell giving the plaintiff notice of what had been done contains the statement that the Home Secretary had directed his mind to this point. Furthermore, the document of Aug. 29, which sets out the grounds upon
B which the order was made, in order that the plaintiff might know what the position was before he went before the advisory committee, makes it clear beyond all possible doubt that it has at any rate been stated that this matter came up for consideration, because it says in terms :

> You . . . were a member of the B.U. . . . and were, up to the time of your arrest, active in the furtherance of the objects of the said organisation by propound-
> C ing in public speech and writings Fascist doctrines.

If that statement is correct, it is clear that those were the specific matters which the Home Secretary was taking into consideration before making this order, and I do not think that that is a matter which I can ignore in dealing with this case.

D Apart from matters of this kind, however, I am invited to come to the conclusion that, in making an order to detain a man for 5 months, the Home Secretary did not apply his mind to the question whether it was necessary to exercise control over that man. I find it very difficult to think that such a state of affairs could exist. One would have thought
E that it was the first thing that anybody would think about before detaining a man for 5 months, and I find it inconceivable that the Home Secretary had not made himself sufficiently aware of the requirements of this order before making an order of this kind. Furthermore, there is evidence in this case by the plaintiff himself that several other members or
F officials of this union had not in fact been detained. The argument is that the Home Secretary appears to have thought that the mere fact that a man had at some time been a member of this organisation would justify him in detaining such a man. If he had thought so, I should imagine that everybody who had ever been a member of the union would
G have been detained, and there is evidence here that some were not. That, again, would appear to lead to the conclusion that the Home Secretary had directed his mind with regard to individual people as to whether it was necessary in their individual cases to make orders for their detention. I myself take the view that, in a proper case, it might be
H sufficient, provided that the Home Secretary was applying his mind to the question of the necessity for exercising control in a particular case, to show that the man had at some time prior to the making of the order been a member of this association, and to show nothing more. It would depend upon his position in the organisation, perhaps, or upon the nature of his activities in the organisation, or upon the length of time which had elapsed since he had ceased to have anything to do with it. Those

appear to me to be particular matters which it would be right to take into consideration, and I am not satisfied that it is necessary in every one of these cases for the Home Secretary to be satisfied that, since a man resigned from the organisation, he must have been a party to some overt act to which the Home Secretary can point. However, I agree entirely, of course, that the necessity for controlling a particular person is a vital matter which the Home Secretary has to consider, or one of the most vital matters, and I find it quite impossible to come to the conclusion in this case that he did not apply his mind to that point.

Counsel for the plaintiff has relied upon *R.* v. *Home Secretary, Ex p. Budd* (3) before the Divisional Court. He is certainly on stronger grounds on this point in the case than was counsel who appeared for Budd, because in *Budd's* case (3) there was an affidavit by the Home Secretary swearing that he had, in fact, applied his mind to this particular point. In this case, the Attorney-General has elected to stand on the case as it is, and the Home Secretary has not gone into the witness-box to swear on oath that he did direct his mind to this point. None the less, for the reasons which I have stated, the evidence of counsel for the plaintiff has quite failed to satisfy me that that is the position, notwithstanding that there has been no denial upon oath by the Home Secretary.

If I did have to go into the state of the facts as they are before me, I should come to the conclusion, upon the limited facts before me, that there was clear evidence upon which the Home Secretary might properly have exercised the discretion which rests with him, and with him alone. Two documents in particular have been relied upon by the Attorney-General. One was a letter which the plaintiff wrote to the head of the Fascist Union on July 23, 1937, when he resigned, in which there occur these words :

> With the evidence in my possession I find that I cannot reconcile my translation of National Socialism with that of the organisation that is now the British Union . . . Meanwhile I am retiring to obscurity with quite a considerable band of idealists whose energy, enthusiasm and constructive minds have made the movement what it is—or rather, what it was . . . One day you will appreciate that this action of mine in writing to you so directly is the best thing that I have yet done for British Union and National Socialism.

That was in July, 1937, but, after writing that letter, the plaintiff did not retire into obscurity by any manner of means, because he took an active part in local politics. It was a part which anybody was perfectly entitled to take, and which nobody would criticise at all, but the fact remains that he did not stay in complete obscurity. He took a very active part in local affairs, and became a member of the local council, and so forth.

Then, after war had broken out, on Jan. 22 in answer to a letter from one Hurst, who had written to him, he wrote a letter in the course of which these expressions occur :

> I will not join any organisation that stipulates as one of its rules that members are not to belong to any other organisation. I differ diametrically from that attitude

> of the B.U.F. which forbade members joining other organisations, for I believe that members should have been encouraged to get behind the scenes of other organisations and thus spread the gospel we were preaching. I forebore from joining Joyce and Beckett for the reason that you had a rule that members should keep out of other organisations . . . Therefore we must win this war or perish as an Empire unless we can get rid of the ruling gang and build up a new state whose interests do not clash with Germany's. The latter is my hope and aim for which I will work . . . Above all, I believe there should be close co-operation between all organised bodies of Fascist National Socialists and any other body that disapproves of this war, but before that can happen one must disperse the attitude that there can be no British Union unless everybody scraps his own organisation or plan and joins only one department or organisation. There is no unity among those who plan unity, so how far can we go ?

It is perfectly true that neither that letter nor the letter of June, 1937, which I read, were before the Home Secretary, or could have been before the Home Secretary, when he made the order complained of. None the less, the plaintiff is presented to me, having regard to his past and so forth, as a man in respect of whom nobody could possibly have come to a conclusion that it was proper for the public safety that he should be detained, and it is merely in that connection that it is right for me to consider how far such an argument can prevail in the light of documents of such a nature as these. The plaintiff's explanation with regard to the letter of Jan. 22, 1940, is that he thought that Hurst was an *agent provocateur*, and that, therefore, he wrote him a document which contained a number of contradictory statements. I certainly do not feel able to accept that explanation, but, even if I did, it seems to me to be no explanation at all, because, if the Home Secretary is considering the necessity for exercising control over somebody, he will be entitled to take into consideration the views which such a person might have expressed, whether they were made to an *agent provocateur* or to anybody else.

I think that this case, taking the material as a whole, quite fails to support the submission of counsel for the plaintiff with regard to this matter. I do not desire to say anything more about the facts of the case, and I should have desired not to mention them at all, because I think that it is very undesirable in cases of this kind, where the court can of necessity know only part of the facts, that it should go into the merits at all. I would not have done so had it not been necessary to deal with the submissions of counsel for the plaintiff. One of the difficulties of seeking to invoke the jurisdiction of this court in these cases is that, of necessity, the court knows only a fraction of the case. This arises from the attitude taken up by the Home Secretary in these cases, which the Court of Appeal has held is the proper attitude—namely, his refusal to put before the court the material upon which he came to his conclusion in the matters. None the less, the case is presented in opening quite properly by putting forward all the matters in favour of the plaintiff, and the case on behalf of the defendants of necessity cannot be really known or gone into at all. It is, therefore, perfectly impossible to express any opinion as to whether or not, in a case of this kind, any injustice has been done to a particular man. I have already indicated that that is the province of the Home Secretary, and of nobody else, provided that he has exercised his powers rightly and within the four corners of reg. 18B (1A).

There is only one other matter to which I need refer, and that is the question of damages. I think that the Attorney-General rather invited me, in order to avoid the necessity of a new trial, to say what damages I would award the plaintiff in case the matter went further and it was held that my decision was wrong. That is a very convenient course to be adopted in many cases, and one which I think the Court of Appeal has said should be adopted by a judge generally, but, in this particular case, I have come to the conclusion that it is quite impossible for me to do that. All I will say is that, as I think counsel for the plaintiff conceded, the plaintiff has quite failed to establish his special damage—namely, that he lost his position with the Trinidad Leasehold Co. by reason of this detention. I think that it was only natural that he should think that he had, having regard to the dates and so forth, but, from the evidence I have heard, I am satisfied that that was not the cause of his losing his position, and the damages, therefore, would have to be merely general damages. However, having regard to the view I take of this matter, I think the damages might depend upon whether the invalidity of the order was based on purely technical grounds or on grounds less technical. For instance, I think that the damages might have to be assessed according to whether they merely arise from the fact that the order was an omnibus order, although perhaps otherwise it might have been quite a proper order to make. The mere fact that it was illegal merely on that ground might make the damages £x. On the other hand, if the ground of the invalidity is that the Home Secretary has carelessly and negligently detained somebody without ever applying his mind to a necessary part of the case, the damages might be more. I am not saying whether or not that is so, but those are all reasons which make it quite impossible for me at this stage to say, if I am wrong in my decision, at what figure I would assess the damages. The result is that there must be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *Oswald Hickson, Collier & Co.* (for the plaintiff); *Treasury Solicitor* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

R. *v.* COMPTROLLER-GENERAL OF PATENTS, *Ex parte* BAYER PRODUCTS, LTD.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **June 30, July 1, 1941.**]

Emergency Legislation -Power to make regulations—Regulation extending suspension of trade mark right to British subjects—Validity—Emergency Powers (Defence) Act, 1939 (c. 62), *s.* 1—*Patents, Designs, Copyright and Trade Marks (Emergency) Act,* 1939 (c. 107), *s.* 3—*Defence (General) Regulations, reg.* 60E.

The Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 3, enabled the Comptroller by order to suspend the trade mark rights of an enemy or an enemy subject. It was found expedient to extend this power to certain trade marks owned by British subjects operating enemy-owned patents, and an amendment to that effect was made by adding a regulation to the Defence (General) Regulations, 1939. It was held that the regulation so made was *ultra vires* :—

HELD : the regulation was not *ultra vires.* His Majesty in Council had been given power by the Emergency Powers (Defence) Act, 1939, to make such orders as appeared to him necessary or expedient for securing public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war and for maintaining supplies and services essential to the life of the community. By that enactment, Parliament had entrusted to His Majesty in Council a complete discretion to decide what regulations were necessary or expedient for the purposes named, and it was not open to the courts to investigate such necessity or expediency.

[**EDITORIAL NOTE.** Where Parliament has delegated its authority to legislate and has given a discretion to the rule-making body as to what rules or regulations it will make in exercise of that delegated authority, and has further provided machinery by which those rules or regulations can be questioned in Parliament, then, so long as the rules or regulations are made for the purposes named in the Act authorising them, their validity cannot be questioned in the courts. The necessity or expediency for making the rules or regulations is purely a question for the authority to whom the power is delegated, except that it can be called in question in Parliament itself. Incidentally the Court of Appeal has reviewed the decision in *Jones (E. H.) (Machine Tools), Ltd.* v. *Farrell and Muirsmith* (1), and finds that, upon the principles they have here stated, that decision cannot be supported.

AS TO DEFENCE REGULATIONS, see HALSBURY, Hailsham Edn., Vol. 6, p. 527, para. 652 ; and FOR CASES, see DIGEST, Vol. 11, pp. 545, 546, Nos. 489-492.]

Cases referred to :

(1) *Jones (E. H.) (Machine Tools), Ltd.* v. *Farrell and Muirsmith,* [1940] 3 All E.R., 608 ; Digest Supp.

(2) *Chester* v. *Bateson,* [1920] 1 K.B. 829 ; Digest Supp. ; 89 L.J.K.B. 387 ; 122 L.T. 684.

(3) *Lipton, Ltd.* v. *Ford,* [1917] 2 K.B. 647 ; 11 Digest 550, *527* ; 86 L.J.K.B. 1241 ; 116 L.T. 632.

(4) *Fowler (John) & Co. (Leeds), Ltd.* v. *Duncan and Crabtree,* [1941] 2 All E.R. 577 ; Digest Supp.

APPEAL by the applicants from a decision of the Divisional Court (VISCOUNT CALDECOTE, L.C.J., HUMPHREYS and SINGLETON, L.JJ.) dated May 23, 1941. Application was made to the Divisional Court for an order of prohibition addressed to the Comptroller-General of Patents on the ground that reg. 60E added to the Defence (General)

Regulations was invalid. The facts are fully stated in the judgment of Scott, L.J.

W. P. Spens, K.C., and *A. E. Beecroft* for the appellants.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*), *Valentine Holmes* and *G. H. Lloyd-Jacob* for the respondent.

Spens, K.C. : The regulation is too wide, and is not made for something which is necessary for the public safety. It is bad on the face of it, because it has nothing to do with the Emergency Powers (Defence) Act, 1939. The power of the regulation-making authority is limited by the terms of that Act. This regulation is one amending a statute, and is *ultra vires*.

The Attorney-General : The Act of 1939 is much wider than that passed in the last war, and His Majesty in Council may make such regulations as appear to him to be necessary or expedient for the public safety or the defence of the realm. The fact that the regulation was made is sufficient proof of the necessity or expediency. The court cannot be asked to decide upon that. The regulation-making power is entrusted to His Majesty in Council, and not to the Comptroller. The legislature in the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, has said that it is expedient to grant rights to operate enemy patents, and the purpose of the regulation complained of is to make that grant as effective as possible. [Counsel referred to *Chester* v. *Bateson* (2), *Lipton, Ltd.* v. *Ford* (3), *Jones* (*E. H.*) (*Machine Tools*), *Ltd.* v. *Farrell and Muirsmith* (1) and *Fowler* (*John*) *& Co.* (*Leeds*), *Ltd.* v. *Duncan and Crabtree* (4).]

Spens, K.C., in reply : The argument that a regulation based on an Act of Parliament is unquestionable in the courts must be wrong. There are limits to be found in the fact that the power is confined to the named purposes. The regulation must be confined to the objects of the statute. The court must not construe the Act as meaning that any regulation may be made.

Scott, L.J. : This is an appeal from the judgment of the Divisional Court, consisting of Viscount Caldecote, L.C.J., and Humphreys and Singleton, JJ., who were asked by Bayer Products, Ltd., to grant a prohibition against the Comptroller-General of Patents and Trade Marks from proceeding under the Defence (General) Regulations, 1939, reg. 60E. The applicants are a British company carrying on business in England in chemical products and medicines. It is evidently a very large business, as may be seen from their year book and price list for 1939-40, which contains a list of the various medicaments which they manufacture and sell, and which sets out in respect of each article the trade mark and composition, properties and indications, dispensing data and the purposes for which it is useful in a medical sense. The company is controlled by shareholders, half the shares being held in Germany by the I.G. Co., as it has been called, and the other half of the shares being owned by Sterling

Products Inc., an American company. The directorate consists of four British directors and one American director. Before the war the company had a number of chemical patents, in which it had at any rate an equitable interest, and in which there were German interests also.

A The Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, was passed on Sept. 21, 1939, and is entitled :

> An Act to make such special provision with respect to patents, registered designs, copyright and trade marks, as is expedient to meet any emergency which may arise as a result of war.

B By sect. 1 of that Act, it was provided that a licence to use an existing patent should not be invalid by reason of the fact that a party interested in it was an enemy. By sect. 2 (1), it was provided :

> Where (*a*) an enemy or an enemy subject is, or has at any time since the beginning of Sept. 3, 1939, been, whether alone or jointly with any other person, the proprietor of a patent . . . and (*b*) the comptroller is satisfied that it is in the interest of all or C any of His Majesty's subjects that the rights conferred by the patent should be exercised . . . and that a person who is not an enemy or an enemy subject desires to exercise the said rights . . . the comptroller may, on the application of that person, make an order granting to him a licence under the patent . . . either for the whole of the residue of the term of the patent . . . or for such less period as the comptroller thinks fit.

D Sect. 3 of the Act was addressed to a matter intimately connected with the operation of patents, although indirectly. It related to trade marks, and by subsect. (1) provided as follows :

> Where it is made to appear to the comptroller that it is difficult or impracticable to describe or refer to an article or substance without the use of a trade mark registered in respect of that article or substance, being a trade mark . . . registered E in the name of an enemy [certain provisions should have effect].

The chief of those provisions (in subsect. (2)) was that on the application of a person proposing to deal in the course of trade in the United Kingdom

> . . . with an article or substance which is or is intended to be the same as, or equivalent to or a substitute for, the article or substance in respect of which the trade mark is registered, the comptroller may order that the right to the use of the trade F mark given by the registration thereof shall be suspended (*a*) so far as regards use thereof by the applicant . . . (*b*) to such extent and for such period as the comptroller may consider necessary for enabling the applicant to render well-known and established some description of, or means of reference to, the article or substance with which he proposes to deal in the course of trade, being a description or means of reference which does not involve the use of the trade mark.

G The object of that provision was this. In such products as Bayer Products, Ltd., deal in, it is almost impossible to sell the product commercially unless it can be given a name which is or can be made well-known, and, for that purpose, references to trade marks are quite invaluable and almost necessary. The sale of the product in its chemical H name being wholly impossible from a practical, commonsense point of view, it is really necessary to sell it by means of some other kind of name. The object of the section was to enable licences to use enemy patents to be operated commercially with advantage by British licensees in the United Kingdom during the war, but that provision was limited, as appears from the section, to the case of trade marks registered in the name of an enemy. It was out of that limitation that this litigation arose. It was thought by the authorities that the utilisation of enemy patents in the names of those who had received licences to use them would be hampered unless they had complete freedom in regard to trade marks, even although they were not registered in the name of an enemy.

In order to deal with that position, recourse was had to the Emergency A
Powers (Defence) Act, 1939, which enables defence regulations to be made, and Defence (General) Regulations, 1939, reg. 60E, was addressed to that object. Its. chief point is that it enables the comptroller in his discretion to deal with trade marks registered in the name of a British subject as well as trade marks registered in the name of an enemy subject. It was the B
validity of the regulation in that respect which was challenged in the proceedings in the Divisional Court.

The question raised in the court below and before us was whether the Emergency Powers (Defence) Act, 1939, confers upon the regulation-making authority power to make reg. 60E. VISCOUNT CALDECOTE, C
L.C.J., delivering the judgment of the Divisional Court, held that it was within the powers conferred by the Act to make that regulation. I agree with the decision to which the court came, and with the reasons given by VISCOUNT CALDECOTE, L.C.J., but will deal shortly with the point in my own words. D

The Emergency Powers (Defence) Act, 1939, was entitled:

> An Act to confer on His Majesty certain powers which it is expedient that His Majesty should be enabled to exercise in the present emergency; and to make further provision for purposes connected with the defence of the realm.

Sect. 1 of that Act provides as follows:

> (1) Subject to the provisions of this section, His Majesty may by order in council E
> make such regulations (in this Act referred to as defence regulations) as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

Subsect. (2) provides as follows: F

> Without prejudice to the generality of the powers conferred by the preceding subsection, defence regulations may, so far as appears to His Majesty in council to be necessary or expedient for any of the purposes mentioned in that subsection . . . (*d*) provide for amending any enactment, for suspending the operation of any enactment, and for applying any enactment with or without modification.

Subsect. (3) provides as follows: G

> Defence regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and byelaws for any of the purposes for which such regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the regulations.

Subsect. (4) provides that a defence regulation shall have effect H

> . . . notwithstanding anything inconsistent therewith contained in any enactment other than this Act . . .

It was contended by the appellants in the court below and before us that, under those provisions, His Majesty in Council was not empowered to make reg. 60E, to which I have referred. The substance of the argument put before us by counsel for the appellants was that the regulation, in so far as it authorised an extension of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 3, so as to make its provisions applicable to registered trade marks of British subjects, was wholly outside the war purposes to which the power conferred by the Emergency Powers (Defence) Act, 1939, s. 1, was confined, and that, if that was so, the fact that His Majesty in Council was allowed by the section to make such regulations as appeared to him to be necessary or expedient for securing those war purposes was not sufficient to validate the regulation in question. In the course of the argument, I asked counsel for the appellants whether his contention was that the particular purposes named in the Emergency Powers (Defence) Act, 1939, s. 1 (1), were limiting words, and that the provision that His Majesty in Council might make such regulations as appeared to him necessary or expedient for those purposes did not authorise departure from the limitation involved in the description of those purposes. In my view, that construction of the subsection was essential to his argument, even assuming that we should even then have been entitled to say that the purposes stated in the subsection were not wide enough to include such action as was taken in the framing of this regulation, and, even on that hypothesis, so to construe the subsection would have been unduly to limit it. Be that as it may, however, the effect of the words "as appear to him to be necessary or expedient" is, in my opinion, to give to His Majesty in Council, as the authority for passing the delegated legislation, a complete discretion entrusted to him by Parliament to decide what regulations are necessary for the purposes named in the subsection. If so, it is not open to His Majesty's courts to investigate the question as to whether or not it was in fact necessary or expedient for the purposes named to make the regulations which were made. The principle upon which delegated legislation must rest in our constitution is that the legislative discretion which is left in plain language by Parliament is one which is to be final, and not subject to control subsequently by the courts. In my view, that subsection clearly conferred upon His Majesty in Council that ultimate discretion to which I have referred. It is easy to see why that discretion must be a very wide one. The history of this war has shown all kinds of ways in which, for instance, the maintenance of supplies and services is essential to the life of the community. I can imagine no instance where that is more obviously the case than that of the supply of the enormous variety of modern medicaments which are necessary for the medical profession and for the maintenance of all our medical services in the country. Having said that, I have dealt with the whole question of principle.

I now turn to the regulation itself, to read the words which it is said are *ultra vires*. Clause (1) provides as follows:

> The Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 3 . . . shall have effect, with the requisite modifications, in relation to unregistered trade marks as it has effect in relation to registered trade marks.

Nothing arises on that. Clause (2) provides that at the end of sect. 3 (2) (*b*), which deals with trade marks, there shall be inserted the words :

> . . . and, if the comptroller so requires, being such a description or means of reference as will be open to the public use.

That is an amendment of the Act within the express words of the Emergency Powers (Defence) Act, 1939, s. 1 (2). Clause (3), which is the critical clause, provides as follows :

> Where a licence under a patent is in force by virtue of an order made under sect. 2 of the said Act [a licence to use an enemy patent] and it is made to appear to the comptroller that it is difficult or impracticable to describe or refer to an article or substance manufactured under the patent without the use of a trade mark registered in respect of that article or substance or of an unregistered trade mark used in relation thereto, the comptroller may make an order in relation to the trade mark under subsect. (2) of the said sect. 3 on the application of the licensee . . . notwithstanding that the trade mark is not and has not been in the proprietorship, or registered in the name, of an enemy or an enemy subject as mentioned in subsect. (1) of the said sect. 3.

The order in council introducing reg. 60E of necessity records by implication the fact that His Majesty in Council thought it either necessary or expedient or both, to extend the powers of the comptroller under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 3, in the way in which the regulation enables him to act. For the reasons I have given, I am of opinion that the subject of the regulation was within the description of the purposes mentioned in the Emergency Powers (Defence) Act, 1939, s. 1 (1), but, even if there be a doubt on that subject, which I personally do not feel, the fact that His Majesty in Council found it necessary or expedient to make the regulation, in my view, concludes the matter, so far as the judicature is concerned.

There has been one decision in the courts which we were asked by the Solicitor-General to reconsider in this case—namely, the judgment of Bennett, J., in *Jones* (*E. H.*) (*Machine Tools*), *Ltd.* v. *Farrell and Muirsmith* (1). In my view, that decision is open to the criticism that Bennett, J., there failed to give effect to the dominant words of the Emergency Powers (Defence) Act, 1939, s. 1 (2)—namely, "without prejudice to the generality of the powers conferred by" subsect. (1). He treated the question before him as solely arising under sect. 1 (2) of that Act, which contained particular powers, *inter alia*, to authorise the taking possession or control of any property or undertaking. He held that those particular words did not authorise what had been done in regard to the "undertaking" which was under "control." Had he considered the case also from the point of view of the general powers of subsect. (1), I do not think that he could have come to the conclusion to which he did. In my view, the subsection authorising the taking possession or control of an undertaking did carry with it the right to do what was proposed in that case. I do not think that it is necessary in this appeal to say anything further about that decision. The appeal must be dismissed with costs.

Clauson, L.J. : On July 24, 1940, His Majesty, by and with the advice of his Privy Council, made reg. 60E in the principal regulations made under the Emergency Powers (Defence) Act, 1939. The order in council is made in pursuance of the Emergency Powers (Defence) Acts. On looking at the Emergency Powers (Defence) Act, 1939, s. 1 (1), I find A that

> . . . His Majesty may by order in council make such regulations . . . as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

B The order in council does not contain an express recital that it appears to His Majesty to be necessary or expedient for those purposes to make this particular regulation, but, as a matter of construction of the order in council, I am clear (and I do not think that anyone in the course of these proceedings has thrown any doubt upon the proposition) that the C order in council shows plainly that it did appear to His Majesty to be necessary or expedient to make this regulation. The fact that the order in council has been made is not, of course, disputed. There is no doubt about it at all.

The Act which gives His Majesty power to make this regulation D contains a provision (sect. 1 (5)) that nothing in the relevant section

> . . . shall authorise the imposition of any form of compulsory naval, military or air force service or any form of industrial conscription or the making of provision for the trial by courts martial of persons not being persons subject to the Naval Discipline Act, to military law or to the Air Force Act.

E If it had been contended that the regulation in question contravened that subsection, it would have been necessary for this court to consider whether or not that contention was correct, but that contention has not been put forward.

Under reg. 60E, certain jurisdiction and powers are vested in the F comptroller. The comptroller is taking steps to exercise that jurisdiction and power. The applicants in the court below, who are the appellants in this court, applied to the King's Bench Division for an order to prohibit the comptroller from so proceeding, on the ground that the regulation under which he was professing to proceed was no part of the law of the G land. It is admitted, and is not disputed, that, if that regulation is part of the law of the land, the comptroller is acting with perfect propriety, and that there is no case for prohibiting him. The contention that it was not part of the law of the land was based upon this. It was said: "His Majesty has made a regulation which he was not authorised by the Act H in question to make." That makes it necessary that we should turn to the Act to see exactly what regulations he was authorised to make. It was argued that the regulation was not necessary or expedient for securing the public safety and so on, but, on turning to the Act, I think that, as a matter of construction of the Act, it is quite clear that the criterion whether or not His Majesty had power to make a particular regulation is not whether that regulation is necessary or expedient for the purpose named, but whether it appears to His Majesty to be necessary or expedient for the purposes named to make the particular regulation. As I construe the Act, Parliament has quite plainly placed it within the power of His Majesty to make any regulation which appears to him to be necessary or expedient for the purposes named.

Accordingly, in my view, the validity of the regulation in question, or of any other regulation of a similar type, can be investigated only by inquiring whether or not His Majesty considered it necessary or expedient, for the purpose named, to make the regulation. Accordingly, in my view, this application for prohibition can succeed only if it is within the power of this court to investigate the action of His Majesty when he stated, as I conceive that His Majesty did in making the order in council, that this regulation appeared to him to be necessary or expedient for the named purpose. In my view, this court has no right or jurisdiction to investigate the reasons which moved His Majesty to reach the conclusion that it was necessary or expedient to make the regulation. The legislature has left the matter to His Majesty, and this court has no control over it. This court, in my view, has no duty and no right to investigate the advice given to His Majesty which moved him to the view that it was necessary or expedient for the purposes in question to make this regulation, and I know of no authority which would justify the court in questioning the decision which His Majesty, as I understand it, has stated that he has come to—namely, that this regulation is necessary or expedient. If His Majesty has once reached that conclusion, that regulation is the law of the land, subject to the fact that the Act specially provides machinery by which, if either House of Parliament is disposed to take a view differing from that upon which His Majesty has been pleased to act, the order can be annulled.

If my view as to the construction of the Act and the effect of it is correct, it is quite clear that it is wholly irrelevant to discuss before this court whether the regulation was in fact necessary or expedient for securing the public safety and so forth. It is a wholly irrelevant matter, and with that we have nothing to do. His Majesty has formed the view that it was necessary or expedient. So far as this court is concerned, in my judgment, there is an end of the matter. For that reason, I do not propose to discuss the regulation, or the effect of it, or what the result will be if the comptroller proceeds to act under it. In my view, these are matters which are entirely outside the purview of the court. While I have listened with due respect to the observations which counsel has made about them, in my view, those observations are entirely irrelevant to the present case, though I must not be understood to differ in any way from the observations which Scott, L.J., has made about the operation of the section or the possible reasons which might well justify the section. In my view, I, sitting here as a member of this court, have nothing to do with that.

It follows that, if the jurisdiction which the comptroller is about to exercise, and which the applicant seeks to prohibit him from exercising, is exercised, as it admittedly is, in accordance with the terms of a regulation which is part of the law of the land, the case is at an end. On that ground, in my judgment, the application properly failed before the King's Bench Division, and the appeal properly fails before this court.

It has been said that there might be a case where, on the face of it, the regulation was bad. The expression was used by VISCOUNT CALDECOTE, L.C.J., in the court below. If that means that, if, on reading the order in council, it appeared that in fact it did not appear to His Majesty to be necessary or expedient for the relevant purposes to make the regulation, I quite agree that, on the face of the order, it would be inoperative under this section. If that is all that is meant by the expression that the order may be bad on the face of it, I do not differ.

There is one other observation which I wish to make. We were referred to a judgment of BENNETT, J., in *Jones* (*E. H.*) (*Machine Tools*), *Ltd*. v. *Farrell and Muirsmith* (1). BENNETT, J., there reached a certain construction of the Emergency Powers (Defence) Act, 1939, s. 1 (2). Speaking for myself, though the matter is quite an unimportant one, I should not have been prepared to reach the same conclusion as BENNETT, J., did, but, although his judgment does not expressly say so, it implies (and I think with reasonable clarity) that BENNETT, J., was of opinion that it was within the purview of the court to hold the regulation invalid if, in the opinion of the court, the making of it was not necessary or expedient for the purposes named in the section. From what I have already said, I think that it is clear that, if BENNETT, J., did intend to decide that (and I think it must be implied that he did), I cannot agree with him, and I should venture to express the opinion that that decision was wrong and should not be upheld. For these reasons, I am of opinion that the judgment of the Divisional Court should be affirmed and this appeal dismissed with costs.

GODDARD, L.J.: I agree with the judgments which have been delivered. I do not think that it is necessary to add anything, because I agree with all that has been said and with the result.

Appeal dismissed with costs.

Solicitors: *McKenna & Co.* (for the appellants); *Solicitor to the Board of Trade* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* ELECTRICITY COMMISSIONERS, *Ex parte* SOUTH WALES ELECTRIC POWER CO.

[King's Bench Division (Viscount Caldecote, L.C.J., and Humphreys and Singleton, JJ.), **May 21, 1941.**]

Electricity Supply—Powers of Electricity Commissioners—Power company—Authorisation of increase of capital—Right of Electricity Commissioners to impose condition—Electricity (Supply) Act, 1919 (*c.* 100), *s.* 1—*South Wales Electric Power Act,* 1932 (*c.* xii), *s.* 19.

The South Wales Electric Power Co., finding it necessary to raise further capital, applied to the Electricity Commissioners for a special order under the South Wales Electric Power Act, 1932, s. 19, authorising an increase of capital. The Commissioners replied to this application by asking for an undertaking that "the promoters would not make any issue of share capital under the powers conferred by the order except by agreement between the promoters and the Electricity Commissioners as to the terms of the issue." The company refused to give the undertaking on the grounds that, by reason of sect. 25 of the Act, the directors were responsible for the management of the company, and that the Commissioners were not authorised by the Electricity (Supply) Act, 1919, to make private bargains with power companies :—

Held : the Commissioners were not entitled to ask for the undertaking.

[EDITORIAL NOTE. Under the Electricity (Supply) Act, 1919, the Electricity Commissioners are given very wide powers, but the powers are mainly directed to the supervision of the technical operations involved in the supply of electricity on a large scale. They are not directed to giving the Commissioners financial control over the companies who supply electricity under statutory powers, and it is here decided that, upon a proper construction of the relevant statutory enactment, the Commissioners had no power to ask for an undertaking in the terms of that here asked for.

As to Powers of Electricity Commissioners, see HALSBURY, Hailsham Edn., Vol. 12, pp. 535-539, paras. 1059-1067 ; and for Cases, see DIGEST, Vol. 20, pp. 197, 198 Nos. 1-3.]

Cases referred to :

(1) *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171 ; 20 Digest 197, *1* ; 93 L.J.K.B. 390 ; 130 L.T. 164.

(2) *R.* v. *Board of Education*, [1910] 2 K.B. 165 ; 42 Digest 614, *141* ; 79 L.J.K.B. 595 ; *sub nom. R.* v. *Board of Education, Ex p. Swansea, Oxford Street, (Church of England) School Managers*, 102 L.T. 578 ; *affd. sub nom. Board of Education* v. *Rice*, [1911] A.C. 179.

Application for an order of prohibition and for an order of *mandamus*. The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

W. Craig Henderson, K.C., and *Alfred Tylor* for the applicants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the respondents.

Viscount Caldecote, L.C.J. : This is an application by the South Wales Electric Power Co. for an order of prohibition, and also for an order of *mandamus*. The South Wales Electric Power Co. is a statutory power company, and its objects are to supply electricity in bulk to authorised undertakers, and, in certain cases, to supply power to individual consumers. It is obvious that from time to time a power company may require increases of capital or of borrowing powers. This particular company was incorporated by the South Wales Electrical Power Distribution Company Act, 1900. The latest Act which deals with the company, and which confers further powers upon it, is the South Wales Electric Power Act, 1932. By this Act, the finances of the company were, to some extent, reorganised. By sect. 14, the company was empowered to raise additional capital within certain limits. Sect. 16 also provided for loan capital and sect. 19 provided as follows :

> The authorised share capital, the authorised loan capital and the amount which may be raised by the company under the last preceding section of this Act may from to time be further increased to such extent as may be authorised by a special order made by the electricity commissioners and confirmed by the Minister in accordance with the provisions of the principal Acts and the company are hereby authorised to make application for and the electricity commissioners to make and the Ministry to confirm such order accordingly.

The South Wales Electric Power Co., finding it necessary to raise further capital, made an application for a special order for an increase of capital to the extent of £1,000,000. The electricity commissioners responded to this application by asking the company to give an undertaking that :

> . . . the promoters would not make any issue of share capital under the powers conferred by the order except by agreement between the promoters and the electricity Commissioners as to the terms of the issue.

Objection to giving this undertaking was taken by the company, on the ground that the persons who were responsible for the management of the finances of the company were the directors. That is to be found, it is said, in sect. 25 of the Act of 1932, which provided :

> Notwithstanding anything in the Companies Clauses Consolidation Acts, 1845 to 1889, or the Companies Clauses Act, 1863, the company may in issuing any unissued portion of the authorised share capital dispose of all or any of the shares or stock representing such capital at such times to such persons on such terms and conditions and in such manner as the directors think advantageous to the company.

Further objection is taken that the electricity commissioners are not entitled to make private bargains with power companies, and are not so authorised by their Act.

The Electricity (Supply) Act, 1919, established the commissioners, and sect. 1 (1) provides as follows :

> For promoting, regulating, and supervising the supply of electricity there shall be established as soon as may be after the passing of this Act, a body to be called the electricity commissioners, who shall have such powers and duties as are conferred on them by or under this Act, and, subject thereto, shall act under the general directions of the Board of Trade [now the Minister of Transport].

The Attorney-General, who has appeared to support the view taken by the electricity commissioners as to the exercise of their powers, has submitted an argument to the effect that any tribunal which is charged with a statutory duty is entitled—and, indeed, bound—to be satisfied on matters relevant to the question to be decided, and that, in this particular case, in deciding the right amount to be authorised by the

special order which was asked for, the electricity commissioners were entitled to take into consideration the amount of money which could be raised by the issue of the authorised increase which was asked for. When that proposition is examined, it appears to be an attempt by the electricity commissioners, not merely to authorise the share capital A
which it thinks the company has properly applied for, but to add to that authorisation a condition that the electricity commissioners shall be the masters of the finances of the company, instead of the directors of the company. In the view which I take, that is an excess of the powers which the electricity commissioners have by virtue of the Act establishing B
them. It certainly would not appear to be within the purposes mentioned in sect. 1 of their Act, which I have read, and the very well-known judgment of ATKIN, L.J., in *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (*1920*), *Ltd.* (1) is applicable to this case. ATKIN, L.J., said, at p. 201 : C

> The effect of the Act is to give the commissioners power to act within limits, wide indeed but strictly defined by statute, and designed to give a large measure of protection to rights already vested in undertakers and private persons.

Again, he said, at p. 208 :

> In the provision that the final decision of the commissioners is not to be operative D
> until it has been approved by the two Houses of Parliament I find nothing inconsistent with the view that in arriving at that decision the commissioners themselves are to act judicially and within the limits prescribed by Act of Parliament, and that the courts have power to keep them within those limits.

I am far from saying that, when the electricity commissioners come to consider an application for a special order increasing the share capital E
of the company, they are to be unable to consider the circumstances in which they find that the application is made, or the circumstances which may exist when the authorised share capital comes to be issued. They may refuse to make a special order upon such examination of the facts as they think to be proper, but what they may not do, in my opinion, F
is to approve the application for an increase of the share capital, and seek to attach to it some condition, or to ask for some undertaking which will make them, not judges of the particular application which they are considering—namely, as to whether the capital should be increased—but judges of the financial management of the company, and to take power G
to decide questions which may not arise for a considerable time after they have made the special order. That seems to me to be sufficient to show that the undertaking for which the electricity commissioners were asking is one for which they had no right to ask.

The questions which it might have been necessary to consider in H
connection with the application for an order of *mandamus* do not arise in this case, because the electricity commissioners in the course of correspondence stated that they were quite satisfied with the purposes for which the additional capital is required, and were prepared to make the order at once in its present form if the company was willing to give the undertaking asked for. On the assumption that the court was

prepared to make an order of prohibition prohibiting the electricity Commissioners from making it a condition of their making a special order that the company would not make any issue of share capital under the powers to be conferred by the order, except by agreement between the company and the electricity commissioners, the Attorney-General has given an undertaking on behalf of the electricity commissioners that they will proceed with the making of the order without attaching the condition which they required—namely, the giving of an undertaking by the company. In these circumstances, all that it is necessary for the court to do is to make an order of prohibition in the terms asked for, and the electricity commissioners will then act in accordance with the undertaking given.

I may be allowed to add that, in my judgment, it is unlikely that Parliament ever intended to give the electricity commissioners the control of the financial position of these companies, having regard to the constitution of the commissioners and the purpose for which they were really established, which was the supervision of the technical operations of the supply of electricity. If Parliament had ever intended to give the electricity commissioners the virtual control of the finance of these companies, I think that it would have been done in explicit terms, which would have left the parties in no doubt as to the powers of the commissioners. In my judgment, an order of prohibition should issue.

HUMPHREYS, J.: I am of the same opinion. I found myself entirely upon the language of the South Wales Electric Power Act, 1932, which is one of the Acts of Parliament applying to the South Wales Electric Power Co., the applicants in this case. Sect. 19 of that Act authorises the company to apply to the electricity commissioners for their permission to increase the authorised share capital of the company, and they have done that. One of the matters which, *ex concessis*, is proper to be considered by the electricity commissioners is the amount of the proposed increase, and that, I find, has been considered by the electricity commissioners. Having considered it, they have stated in writing that they are prepared to agree to, and approve of, the proposed increase of the authorised share capital of this company to the extent of an amount not exceeding £1,000,000 nominal capital. They have added that they will not make any such order unless the company is prepared to give an undertaking the terms of which have been read.

In my view, in demanding that undertaking, the commissioners were acting without any authorisation at all. There are certainly no words in sect. 19 which would justify the commissioners in demanding as the price of their consent any undertaking from the company at all, and, when I find that the particular matter upon which they require an undertaking to be given is that the promoters—that is, the company—will not make any issue of shares under the powers conferred by the order except by agreement between themselves and the electricity commissioners as to the terms of it, I turn to sect. 25 of the same Act, which appears to me to leave to the directors of the company in terms the consideration, and the sole consideration, of such matters. Further, looking at what may be described as the general Act upon this subject—namely, the Electricity (Supply) Act, 1919, which in fact created the electricity commissioners—I can find nothing in the whole of that Act which could be suggested to justify their interfering in this matter. I would add that it may or may not be desirable that they should be given power to interfere in such matters. About that I express no opinion, because I know nothing, but I am quite clear that there is nothing to be found in the Act of Parliament at the present time which gives them any power at all to require such an undertaking. For these reasons, I agree that the writ of prohibition should issue.

Singleton, J. : I am of the same opinion, and I think it right to add a few words because of the importance of this case generally. It is unnecessary to say anything in regard to the application for an order of *mandamus*, in view of what the Attorney-General has said to us. That which we have to consider is the application by the South Wales Electric Power Co. for an order prohibiting the electricity commissioners from making it a condition of their making a special order authorising the South Wales Electric Power Co. to raise additional capital not to exceed £1,000,000 and to borrow any sum or sums not exceeding £1,000,000 that the South Wales Electric Power Co. should give the electricity commissioners the undertaking outside the order that they will not make any issue of share capital under the powers conferred by that order except by agreement between the South Wales Electric Power Co. and the electricity commissioners as to the terms of the issue of such capital.

The dispute between the applicants and the electricity commissioners has lasted for almost a year. On Oct. 14, 1940, after a meeting between the parties, the solicitors for the applicants wrote to the secretary to the electricity commissioners in these terms :

> As arranged at our meeting with the commissioners on the 2nd instant, we write to put on record that as the chairman of the commissioners then stated, the commissioners are quite satisfied as to the purposes for which the additional capital is required and are prepared to make the order at once in its present form if our clients are willing to give the undertaking asked for by the commissioners' letter of July 13, but that the commissioners are not prepared to make the order at all if that undertaking is not given. We shall be glad if you will kindly confirm that the above correctly represents the attitude of the commissioners. If so, for the reasons of which the commissioners are fully aware, our clients propose to take proceedings to test the right of the commissioners to insist on the undertaking as a condition of making the order.

The reply to that letter, dated Oct. 25, 1940, is as follows :

> The electricity commissioners have had before them your letter of Oct. 14, and desire me to confirm that the letter correctly represents their attitude in regard to the application for the above-mentioned order, subject to the qualification that in the event of the order being made the commissioners, as indicated at the meeting with your clients on Oct. 2, would propose to include a saving clause which has been asked for by H.M. Treasury in respect of their emergency powers. A copy of the clause is attached for the information of your clients.

Nothing arises as to that clause, and, indeed, everybody knows that in these days the Treasury retain complete control over new issues of capital, but the electricity commissioners sought to obtain from the applicants an undertaking in the terms set out in the letter from the secretary to the electricity commissioners, dated July 13, 1940. The electricity commissioners sought to obtain from the applicants an undertaking outside the order :

> . . . that the promoters [the applicants] would not make any issue of share capital under the power conferred by the order, except by agreement between the promoters and the electricity commissioners as to the terms of its issue.

The electricity commissioners are a body established by the Electricity (Supply) Act, 1919, and, as has been said, in particular in the judgment of ATKIN, L.J., in the Court of Appeal in *R.* v. *Electricity Commissioners, Ex p. London Electricity Joint Committee Co.* (1), they are bound to act within the limits of that statute, and they cannot go outside the powers given to them. In this particular case, it seems to me that they are seeking to do so. It is true that, under the South Wales Electric Power Act, 1932, s. 19, any increase of capital of the applicants has to be by special order made by the electricity commissioners and confirmed in the manner shown in the section itself, but, over and above that, sect. 25 of that Act shows that the company may, in issuing any unissued portion of the authorised share capital (which includes new capital as provided under sect. 19 of the Act), dispose of all or any of the shares or stock representing such capital at such times, to such persons, on such terms and conditions, and in such manner as the directors think advantageous to the company. By sect. 25, the directors are given complete control over the issue of new capital. The terms and conditions are left to them. When the electricity commissioners seek to obtain an undertaking that the promoters will not make any issue of share capital under the powers conferred by the order except by agreement between the promoters and the electricity commissioners as to the terms of the issue, it appears to me quite clear that the electricity commissioners are endeavouring to place themselves in the position given to the directors by sect. 25 of the Act of 1932. That was not the intention of Parliament. Parliament has taken certain means to limit the possibility of earnings of statutory companies, of which this is one. It took steps to limit the dividends which could be paid, and those steps were taken a good many years ago. In 1932, Parliament decided that it should be left to the directors of this company to decide the terms and conditions upon which there should be new issues of capital. If Parliament had then thought it desirable to hand over a matter of that kind to the electricity commissioners, it could have done so. The electricity commissioners seek to take what would be complete power to settle the terms and conditions of new issues of capital. That is something, as I think, within the scope of the directors, and within the scope of the directors alone. Whether it is desirable that the electricity commissioners should be given such power is not a matter with which this court is concerned. The only question for us is whether or not the electricity commissioners, by seeking to impose an undertaking of this kind upon the applicants, are doing something which they are not entitled by law to do. In *R.* v. *Board of Education* (2), Farwell, L.J., in the course of his judgment, dealt with this class of case, and I would read a few lines from his judgment. Dealing with the facts of that case, he said, at p. 179:

> If the tribunal has exercised the discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the courts have regarded them as declining jurisdiction.

It seems to me that the electricity commissioners in this case, in seeking to extract from the applicants an undertaking of the kind which is put forward in this case, were bringing in extraneous matters, with which they were not concerned, in view of their statutory position created by the Act of 1919. They had no power to ask for any such undertaking. It was for them to consider the application, but to consider it on all relevant matters, and the undertaking for which they asked, in my view, is not a relevant matter. In those circumstances, it seems to me that the applicants are entitled to that for which they ask—namely, an order prohibiting the electricity commissioners from making it a condition of their special order that there should be an undertaking such as that which is asked for.

Order granted.

Solicitors: *Sydney Morse & Co.* (for the applicants); *Treasury Solicitor* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

CUSHING *v.* PETER WALKER & SON (WARRINGTON & BURTON), LTD.

[LIVERPOOL SUMMER ASSIZES (Hallett, J.), **June 25, 1941.**]

Nuisance—Created by stranger—Creation unknown to occupier—Not discoverable on reasonable examination—Liability of occupier.

A slate fell from the roof of certain premises and injured the plaintiff. It was found as a fact that the slate was loosened by the blast from an enemy bomb on Sept. 21, 1940, but did not fall until Oct. 9, 1940. The immediate cause of the fall was a high wind on Oct. 9, 1940, but the following facts were also found: (i) that the wind by itself would not have caused the slate to fall, had it not been previously loosened by the blast, and (ii) reasonable inspection of the roof did not disclose the fact that the slate had been loosened by the blast of the bomb:—

HELD: the defendants were not liable as having continued a nuisance the existence of which they ought to have known.

[**EDITORIAL NOTE.** This is the first case dealing with what may be termed the latent effect of enemy action. It is well-understood, that, quite apart from the visible effects of the blast from a bomb, there must be in many cases other results hidden from view and probably not discoverable on any reasonable examination. It is here found as a fact that the defect was caused by blast and was not discoverable by any reasonable examination, and it is held that the defendants are not liable, applying the doctrine relating to the continuing of a nuisance recently stated by the House of Lords in *Sedleigh-Denfield* v. *O'Callagan* (4). It may perhaps be questioned whether there was in law any trespass to the defendants' premises, but it would seem sufficient that the insecurity of the slate arose from the act of someone for whom the defendants were not responsible.

AS TO CONTINUING NUISANCE, see HALSBURY, Hailsham Edn., Vol. 24, pp. 84, 85, para. 148; and FOR CASES, see DIGEST, Vol. 36, p. 214, Nos. 567-575.]

Cases referred to:

(1) *Barker* v. *Herbert*, [1911] 2 K.B. 633; 36 Digest 197, *374*; 80 L.J.K.B. 1329; 105 L.T. 349.

(2) *Slater* v. *Worthington's Cash Stores (1930), Ltd.*, [1941] 1 All E.R. 245; Digest Supp.; *affd.* (1941), 57 T.L.R. 468.

(3) *Wringe* v. *Cohen*, [1940] 1 K.B. 229; [1939] 4 All E.R. 241; Digest Supp.; 109 L.J.K.B. 227; 161 L.T. 366.

(4) *Sedleigh-Denfield* v. *O'Callagan (Trustees for St. Joseph's Society for Foreign Missions)*, [1940] A.C. 880; [1940] 3 All E.R. 349; Digest Supp.

(5) *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; 26 Digest 433, *1519*; 45 L.J.Q.B. 260; 34 L.T. 97.

(6) *Noble* v. *Harrison*, [1926] 2 K.B. 332; 36 Digest 189, *316*; 95 L.J.K.B. 813; 135 L.T. 325.

(7) *A.-G.* v. *Tod Heatley*, [1897] 1 Ch. 560; 36 Digest 177, *221*; 66 L.J.Ch. 275; 76 L.T. 174.

(8) *Broder* v. *Saillard* (1876), 2 Ch.D. 692; 36 Digest 190, *321*; 45 L.J.Ch. 414.

ACTION for damages for personal injuries caused by a falling slate, which had been loosened from the roof of a public house by enemy action. The facts are fully set out in the judgment.

E. G. Hemmerde, K.C., and *B. R. Rice-Jones* for the plaintiff.

G. J. Lynskey, K.C., and *A. E. Baucher* for the defendants.

HALLETT, J.: The defendants in this action, a well-known firm of brewers, were at all material times, and still are, the owners and occupiers of certain licensed premises known as the Monument public house, situated at the corner of London Road and Audley Street in Liverpool. On Oct. 9, 1940, shortly after mid-day, the plaintiff, who is a woman of 67 years of age, was walking along London Road past the defendants' premises when a slate fell from the roof and struck her. She was walking with her arms under her shawl, which was no doubt a fortunate circumstance, and the injuries which she sustained were remarkably light. I assess her special damage at £10 and general damages at £115, subject, of course, to the question of liability, with which my judgment will mainly deal.

I now turn to the question of liability. It was contended for the plaintiff, and conceded for the defendants—and I agree—that, if the fall of the slate remained unexplained, the defendants would be clearly liable. The case, as pleaded for the plaintiff, was put both upon negligence and upon nuisance, but, during the course of the hearing, counsel for the plaintiff told me that he relied mainly—and I think he said exclusively—upon nuisance as the basis for the claim. I am not sure that in this case it really would make very much difference. As I have said, if the fall of the slate were unexplained, it was common ground that the defendants would be liable, because there would be *prima facie* evidence that their premises were at the time in a state which was dangerous to passers-by on the highway. In fact, however, the fall of the slate was not unexplained. In the first place, it was actually witnessed by the witness Davies, who was called on behalf of the plaintiff, and it may be convenient if I observe at this stage that here, fortunately, there is really no question of credibility to be resolved. I have had called before me a number of honest witnesses, and I do not think that it is suggested on either side that any of their evidence is, in substance, inaccurate. The real contest here has been, first, as to what conclusions of fact should be derived from the evidence given, and, secondly, as to what conclusions of law follow from those conclusions of fact. Davies is a glazier, and on Oct. 9, 1940, at the time when the accident occurred, he was working at the Midland Bank in London Road. On Sept. 21, 1940, there had been a very severe enemy raid upon this city, and, as a result of that enemy action, bombs had been dropped on the Midland Bank in London Road opposite the Monument public house, and more or less facing up Audley Street looking northwards. That bank had had its windows broken, and Davies, who is a glazier, at the time in question was on the second floor of the bank in front, engaged in repairing the windows. He had been working on those premises since the previous Monday, the accident being on the Wednesday, and, according to his evidence, which I believe, until the event mentioned, he had noticed nothing whatever wrong with the defendants' roof. He says that he had noticed that roof from a distance which he puts at about 25 yards, and that it had seemed to be in good order.

On Wednesday, Oct. 9, 1940, however, just when the plaintiff was passing, Davies saw a slate lift bodily, dive down the roof to the edge of the gutter, and come down in a zig-zag fashion. He says that at the time when this happened it was blowing a terrible gale, with an easterly wind. Again there is a mesaure of agreement between counsel for the plaintiff and counsel for the defendants. Counsel for the plaintiff submits, and counsel for the defendants concedes, that, before wind can amount to an act of God, so that the defendants escape liability for the action of the wind, the wind must not merely be exceptionally strong, but must be of such exceptional strength that no one could be reasonably expected to anticipate or provide against it. I do not think that it is necessary to examine such authorities as there may be, but, having regard to what has been decided in respect to other natural phenomena, such as, for instance, an exceptionally high tide, or an exceptional downfall of rain, I think that counsel for the defendants was correct in making that concession. He further conceded, as I understand—and again, as I think, correctly—that in this case there was no evidence which would justify me in holding that this gale, although described by Davies as "terrible," was of such a character as to amount to an act of God. Consequently, it is agreed that, if the fall of the slate was brought about wholly by the operation of the wind, the defendants would fail, because it would be shown that their premises were in a dangerous state in so far as the slating was not affixed so as to resist the force of the wind.

However, the case for the defendants is, and always has been, that the insecure condition of that slate was not due to any lack of repair on the part of the defendants, but was due to the enemy action which had taken place on Sept. 21, 1940, and the first question which emerges for my decision in this case is whether that has been sufficiently established by the evidence. The second question which emerges is this. As counsel for the plaintiff says, even if, which is not admitted, the insecure state of the slate on Oct. 9, 1940, had been caused by the enemy action of Sept. 21, 1940, yet none the less the defendants are liable, inasmuch as admittedly they had done nothing to repair the roof or to make the slating thereof more secure between Sept. 21, 1940, when the enemy action occurred, and Oct. 9, 1940, when the plaintiff met with her accident. That, of course, involves consideration of certain reported cases, and of certain aspects of the law.

I was told by one of the witnesses, and I accept it, that slating can become loose and insecure upon a roof quite apart from enemy action, and quite apart from the operation of any gale, and that, having become insecure, it may not lose its place. I am also told that that would ordinarily happen because the nails which hold the slates have become corroded. It seems to me, therefore, that a logical way of approaching this matter is to consider whether there is any reason for supposing that this slating had become insecure irrespective of any enemy action, and irrespective of the gale.

After the accident, the witness McCaffrey, who was clearly an experienced man, and, I thought, a very good witness, was instructed to attend and repair the roof, and he went on to the roof himself. He found very little damage indeed, but what he did find was this. He found that in certain places the nails which held the slates up had been prized up from the battens. They were not actually out of the battens, but they had been prized up, and one of the two nails which had been holding this particular slate had been prized up. The slate itself had been cracked right across, about one-third of the way down, and the bottom two-thirds of the slate had slid down the roof, been lifted over the edge by the wind, and hit the plaintiff. McCaffrey said two things of importance. In the first place, he said that, while corrosion of the nails had started, it had only just started, and, in the ordinary course, they would have lasted for another three or four years. To my mind, McCaffrey established quite satisfactorily that there was nothing in the nature of natural decay about this slating, or about the method in which it was secured. Obviously, I think, the insecurity of the slate had been brought about by something in the nature of external violent action. The other matter which McCaffrey established, and which is relevant when I come to a later part of my judgment, is that the place where the nails are and the place where the slates had been cracked are not visible upon an inspection merely by means of the eyes, from however short a range it is made. McCaffrey explained to me that the portion of the slate where the nails are, and where the crack had been, is a portion which is covered up by at least one layer of overlapping slates. The result is that it would have been necessary for the witnesses, in order to ascertain that this slate had got into this condition, not merely to get up on to the roof, let alone look at the roof, but also actually to test the slates one by one with the hand or with some tool, unless one slate, by reason of the insecurity of its fastening, had become displaced, in which case the displacement of the slate would have become obvious to the naked eye. I think that any question of this accident having been brought about by a process of natural decay and non-repair is definitely excluded by the evidence before me.

Davies, the glazier, told me, as I have already mentioned, that during the three days immediately preceding the accident, when he was looking from time to time at the roof, he had noticed nothing wrong with it. However, there is also available further evidence upon that aspect of the matter. Mosley is the official employed by the corporation who is notified in case of air-raid damage, and he examined very thoroughly the premises of Messrs. Hughes, which are just opposite the western side of the Monument public-house. They had had a bomb apparently just outside them, and they were the premises which appeared to Mosley to have been principally damaged. However, there was window and door damage, as I think it is sometimes called, to the public house, and Mosley examined the defendants' premises from the outside, and also from the roof of Messrs. Hughes' premises, to see whether there was anything which called for action by him, and he says that he cannot remember anything being wrong with the roof of the Monument publichouse. Furthermore, he says that, if there had been anything in a state of disrepair before the enemy action of Sept. 21, 1940, and if, in particular, the slates or a slate had become insecure through decay of the nails, or for any other reason, A the blast which had taken place in that neighbourhood as a result of enemy action would have made that insecurity manifest by way of displacing the slate or slates. To my mind, I had no hesitation whatever in accepting that opinion as correct, and it was confirmed by other witnesses. In cross-examination, he said that, if the slates were not out of line, he B would have assumed that there was nothing wrong. He was looking down on to the roof of the publichouse from Hughes' roof some 35 ft. higher up, and he was quite positive, although he was carefully tested in cross-examination, that, if there had been anything visible, he would have seen it, and, as far as he was concerned, he did not think that any C closer inspection was necessary.

Other witnesses examined the roof from the ground to see if repairs were necessary, and they agree that the roof, so far as they could see, had not been disturbed in any shape or form, and that no slates were out of position.

D As a result of that evidence, I have come to one conclusion of fact with reasonable certainty. I think that it is reasonably plain that, prior to the enemy action of Sept. 21, 1940, there can have been nothing insecure about the slating of that roof, because I am quite convinced by the evidence given that, if there had been anything insecure about the slating E of that roof before the enemy action of Sept. 21, 1940, that enemy action would have produced visible signs and results in the insecurity of the roof, which these witnesses would have seen.

That closes one end of the period, but there still remains a question of fact which has given me a good deal of trouble—namely, whether the F insecurity of the slate could have been produced by the wind independently of enemy action. There is no doubt whatever that McCaffrey took the view that the state of affairs which he found—that is to say, the nails having been prized up, and the slate having been cracked—had been introduced by the blast through enemy action, and not by the force of G the gale. In fact, he told me in terms that he thought that the blast had lifted the slates, and had dropped them back into position, and that it was by the lifting of the slates in that way that the nails had been prized up, and by their dropping back into position in that way that the cracking had taken place. There is no doubt whatever that that was his theory H of how the insecurity of this particular slate had been produced, and, when, in cross-examination, the question was put to him more directly than the question of whether the gale could have produced what he saw, his answer was that he doubted whether the gale could have done it. It is obvious that my task in regard to finding the facts would have been easier if McCaffrey had been able to give a more positive answer than that. I have, however, come to the conclusion that the insecurity of this particular slate was produced by enemy action on Sept. 21, 1940. I think that any suggestion that the loosening of the slate was wholly brought about by the gale which blew on Oct. 9 is sufficiently negatived by the evidence.

That being the position, I come to the legal aspect of the matter. I have been referred to three cases, and I have myself referred counsel to a fourth. The first case to which I was referred was *Barker* v. *Herbert* (1). That case has been very often considered in subsequent cases, and in particular it has been fully considered in two other cases to which I am going to refer, but, upon the whole, I do not think that in the course of my judgment I shall refer to it in detail again. The latest case in point of time to which I have been referred is *Slater* v. *Worthington's Cash Stores (1930), Ltd.* (2). That was a case where there had been a heavy snowfall and the snow had been permitted by the occupiers of certain premises to remain on their roof until it fell off and injured the plaintiff. SCOTT, L.J., said that the defendants had sufficient knowledge of the position of affairs to impute to them knowledge of the danger to passers-by resulting from the presence of the snow, and he held that the defendants were clearly liable, because they had knowledge which placed on them a duty either to take steps to abate the nuisance or to prevent persons from passing underneath after a fall of snow. GODDARD, L.J., said that the defendants knew that there was a large accumulation of snow on the roof, and that it was a potential source of danger. He could see no answer to the case, whether it was put in negligence or in nuisance. No authorities are mentioned in the report before me, and I do not really think that I derive much assistance from that case.

The remaining case to which I was referred by counsel is *Wringe* v. *Cohen* (3). The case to which I myself referred is *Sedleigh-Denfield* v. *O'Callagan* (*Trustees for St. Joseph's Society for Foreign Missions*) (4). In the decision of the House of Lords, 28 cases were reviewed, curiously enough not including *Wringe* v. *Cohen* (3), although that was some months earlier in point of time. I have already expressed my view that between the occurrence of the enemy action and the occurrence of the accident there was nothing in the state of the roof visible from the ground or from neighbouring and higher roofs, or from neighbouring and higher windows, to show that there was anything wrong with the roof. I may add that, on the evidence, I am satisfied that, even if someone had mounted a ladder for the purpose of inspecting the roof, he would not have detected what was wrong with this particular slate. It was hidden from the eye.

I think that the witness Makinson is right in saying, and none of the other witnesses said anything to the contrary, that, even if someone had climbed on to the roof to see what had gone wrong, it would have involved examining each individual slate. It seems to me that, on the evidence before me, that is right, and the question which I now have to consider, therefore, is whether, by failing to discover the insecurity of the slate between Sept. 21, 1940, and Oct. 9, 1940, the defendants have rendered themselves liable to the plaintiff.

At first I was disposed to think that the law upon this aspect of the matter was not altogether easy, but, as a result of very carefully considering *Wringe* v. *Cohen* (3) and *Sedleigh-Denfield* v. *O'Callagan* (*Trustees for St. Joseph's Society for Foreign Missions*) (4), I have come to the conclusion that the law as established by those cases is really reasonably plain. It seems to me that the first thing to consider is whether the *gravamen* of the complaint made by this particular plaintiff, or by any particular plaintiff in a like case, is the causing of the nuisance or the continuance of a nuisance caused by another. If the *gravamen* of the complaint is the causing of the nuisance, then it seems to me quite plain upon *Wringe* v. *Cohen* (3), which is binding upon me, that it is irrelevant whether the defendants knew, or ought to have known, that the nuisance had, in fact, been caused. For instance, if I venture to look at the judgment of BLACKBURN, J., in *Tarry* v. *Ashton* (5)—which I do with all becoming hesitation, seeing that in *Wringe* v. *Cohen* (3) there is a long list of eminent judges who are said to have misunderstood that judgment—there is this passage at p. 319 :

> So also the occupier would be bound to know that things like this lamp will ultimately get out of order, and, as occupier, there would be a duty cast upon him from time to time to investigate the state of the lamp.

Wringe v. *Cohen* (3) emphasises that the occupier of premises is under a duty to repair them so as to prevent their becoming a nuisance to neighbouring premises or to users of the highway, and, if it be established that there has been a breach of the duty to repair and that a nuisance has come into existence as a result of that breach, and that, also resulting from that nuisance, special and particular damage has been caused to the plaintiff, then the cause of action is complete, as I understand it, and it is no defence for the defendants to say : " We did not know, nor can it be said that we ought to have known, that a defect had, in fact, resulted from the breach of our duty to repair." In such a case the *gravamen* of the complaint is the breach of the duty to repair. That breach was, of course, perfectly well known to the defendants, and it is, therefore, immaterial whether the consequences of the breach—namely, the arising of the defect which constituted the nuisance—had also become known to the defendants. On the other hand, if the *gravamen* of the complaint is the continuance of a nuisance caused by another, then the position is different. In the present case, it is plain that the *gravamen* of the complaint is not the causing of the nuisance. On the facts which I have found, the nuisance was caused by enemy action, and the *gravamen* of the complaint must be the continuance of the nuisance so caused by another—namely, by enemy action. Another way of putting the same point is that if the occupier of the premises has known of that which may cause the defect, and if he is responsible for that which may cause the defect, as in the case of want of repair, then he is liable, although he does not know of the defect. On the other hand, if he does not know of that which might cause the defect—for instance, in the case of an act by an employee, or a weakness caused by underground workmen—and if he does not know of the defect, then he is not liable.

The matter with regard to a trespasser is put quite simply in *Wringe* v. *Cohen* (3), at p. 243 ([1939] 4 All E.R., at p. 250) :

> If the nuisance is due to the occupier's failure to keep in repair, there is liability. If it is due to the act of a trespasser there is no liability without proof of subsequent culpable neglect. A

To take one sentence of a judgment might be unsafe, but I propose to deal with some other passages in the judgment presently. Pausing there for a moment, however, this insecurity of the slating was due to the act of a trespasser. No one would hesitate, I suppose, to describe German B airmen as trespassers. Then the question arises : " Is there proof here of subsequent culpable neglect on the part of the defendants ? " Then, later on in *Wringe* v. *Cohen* (3), Atkinson, J., deals with the other aspect of the matter when he discusses *Noble* v. *Harrison* (6), a case of the breaking of a branch of a tree. He says, at p. 244 ([1939] 4 All C E.R., at p. 250) :

> The plaintiff claimed damages, but failed because the fracture was due to a latent defect not discoverable by any reasonably careful inspection, which defect was, of course, unknown to the defendant.

The claim was based on nuisance, and he then cited the passage in the D judgment of Rowlatt, J., in *Noble* v. *Harrison* (6) which has been so frequently cited, and which has once more been approved by the Court of Appeal in *Wringe* v. *Cohen* (3).

Here, as it seems to me, the doctrine which led to the decision in *Wringe* v. *Cohen* (3) has really no application. What the court was E concerned with there was a breach of the duty to repair, and it was for that breach of duty to repair that the defendants were held to have become liable, and it was in connection with the defects arising from that breach of duty to repair that the court laid down the principle that the knowledge, or the means of knowledge, is irrelevant. Where, however, the state of F affairs which leads to the nuisance has been brought about by the act of a trespasser, or by some latent cause, then the breach of duty must be found in something which the defendants have subsequently wrongly omitted to do.

At one time it was suggested to me that some difficulty was caused G by the use of the adjective " latent " in the judgment in *Wringe* v. *Cohen* (3). Of course, here, while the defect itself was latent, in the sense that it was hidden away under other slates, yet the cause of the defect was, as we now know, patent enough. Nothing could be more patent than the bombs and blast. The cause of the defect was patent enough, and I H doubt, therefore, really whether counsel for the defendants could successfully bring this case within the category to which the judge in *Wringe* v. *Cohen* (3) referred when he talked about " latent causes " and used other similar expressions. It will be observed that, as an example, he referred to underground mining operations which might have weakened the stability of the premises. Nothing more exactly the opposite of such a thing can be imagined than these operations from overhead, which produced the blast in the present case, but I think that the true category in which counsel for the defendants must seek to place this case is the category of action by trespassers producing the defect in the first instance. With regard, then, to what is the legal position, I derive most assistance from the opinions of their Lordships in *Sedleigh-Denfield* v. *O'Callagan* (*Trustees for St. Joseph's Society for Foreign Missions*) (4), and I propose to conclude this judgment by referring to a few passages from those opinions and then by answering, as best I can, the questions which I think those opinions direct me to ask myself. First of all, there is the opinion of VISCOUNT MAUGHAM at p. 358 :

> In my opinion, an occupier of land " continues " a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end, though with ample time to do so.

The next opinion was delivered by LORD ATKIN, and I find this passage, at p. 361 :

> In the present case, however, there is, as I have said, sufficient proof of the knowledge of the defendants both of the cause and of its probable effect. What is the legal result of the original cause being due to the act of a trespasser ? In my opinion, the defendants clearly continued the nuisance, for they come clearly within the terms I have mentioned above. They knew the danger, they were able to prevent it, and they omitted to prevent it. In this respect, at least there seems to me to be no difference between the case of a public nuisance and that of a private nuisance, and *A.-G.* v. *Tod Heatley* (7) is conclusive to show that, where the occupier has knowledge of a public nuisance, has the means of remedying it, and fails to do so, he may be enjoined from allowing it to continue.

There is still more on the following pages which, I think, is of great assistance to me, but it is on record, and I do not think that I need encumber my judgment by reading it aloud. I observe once more that LORD WRIGHT does not refer to the suggestion made in *Wringe* v. *Cohen* (3) that he, in common with many other judges, had previously misunderstood *Tarry* v. *Ashton* (5). *Sedleigh-Denfield* v. *O'Callagan* (*Trustees for St. Joseph's Society for Foreign Missions*) (4) was heard by their Lordships on Apr. 18, 22, 23, 24, 1940, and the opinions were delivered on June 24, 1940, whereas *Wringe* v. *Cohen* (3) was heard on Oct. 23, 24, 1939, and the judgment was delivered on Nov. 8, 1939.

In *Wringe* v. *Cohen* (3), the Court of Appeal gave leave to appeal to the House of Lords, but I have no knowledge as to whether advantage was taken of that leave to appeal, and, if so, with what result. It is perhaps a little unfortunate from my own point of view that in *Sedleigh-Denfield* v. *O'Callagan* (*Trustees for St. Joseph's Society for Foreign Missions*) (4), which, as I have just stated, was some months later, no mention appears to have been made of the earlier case of *Wringe* v. *Cohen* (3). It may be because it was not thought to be relevant, or it may very well be because there is nothing in *Sedleigh-Denfield's* case (4) in the House of Lords inconsistent with what had been said earlier by the Court of Appeal. I see that in *Sedleigh-Denfield's* case (4) there is a passage in the opinion of LORD ROMER in which he says much the same thing as has been said by others of their Lordships. LORD ROMER said, at p. 371 :

> The respondents did not themselves create this potential nuisance, and cannot, therefore, be held liable for its creation, but an occupier of land upon which a nuisance has been created by another person is liable if he "continues" the nuisance. What acts or omissions on his part are sufficient to constitute a continuance of the nuisance is a question which probably does not admit of a comprehensive answer, but I agree with my noble and learned friend Viscount Maugham, whose opinion I have had the privilege of reading, that the occupier "continues" a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end, though with ample time to do so. Judging them by this criterion, the respondents clearly continued the potential nuisance created by the Middlesex County Council.

I cite that passage because I think that that and similar passages present the question which, on the authority of the House of Lords, I ought to ask myself, and by answering which I should be able to arrive at a correct judgment in this case. I have only two more passages to read. Lord Porter said, at p. 375:

> It is clear that an occupier may be liable though (i) he is wholly blameless, (ii) he is not only ignorant of the existence of the nuisance but also without means of detecting it, and (iii) he entered into occupation after the nuisance had come into existence: see *Broder* v. *Saillard* (8). Such a liability is, I think, inconsistent with the contention that the occupier is not liable for the acts of a trespasser of which he has knowledge, though possibly it might be contended that he is responsible for the acts of his predecessor in title, but not for those of a trespasser. Such a contention, however, is, I think, unsound, and the true view is that the occupier of land is liable for a nuisance existing on his property to the extent that he can reasonably abate it, even though he neither created it nor received any benefit from it. It is enough if he permitted it to continue after he knew, or ought to have known, of its existence. To this extent, but to no greater extent, he must be proved to have adopted the act of the creator of the nuisance.

Then Lord Porter concludes as follows, at p. 376:

> However, the respondents had, as I have indicated, or ought to have had, knowledge of the danger and could have prevented the danger, if they had acted reasonably. For this I think they were liable—not because they were negligent, though it may be that they were, but for nuisance, because, with knowledge that a state of things existed which might at any time give rise to a nuisance, they took no steps to remedy that state of affairs.

I have referred rather at length to the opinions in *Sedleigh-Denfield's* case (4), because it seems to me that, once I have come to a conclusion upon a question of fact that the insecurity of this slate which caused the defendants' premises to become a nuisance, as I think it did, arose from enemy action, the passages which I have cited afford me the requisite guidance as to what I have to decide. Taking the words of Viscount Maugham, in order to avoid repeating them, I think that what I have to decide in this case is whether these defendants, with knowledge or presumed knowledge of this nuisance—namely, the insecurity of the slating—failed to take any reasonable means to bring it to an end, although they had ample time so to do. Upon the whole, I answer that question in favour of the defendants. As regards time, there was a time from Sept. 21, 1940, to Oct. 9, 1940, and, if on Sept. 21, or shortly thereafter, they knew—of which there is no evidence—or ought to have known, which is the point in controversy, not merely that there had been hostile action in the neighbourhood of their premises—that they clearly did know—and not merely knew that such hostile action had caused some damage—that, again, they clearly did know—but if they ought to have known that the hostile action had rendered the roof of their premises dangerous, then I think they would be liable, because I think that there was time for them, if they could not find a man from their own staff, to have got someone else to go up to the roof and attend to it. To my mind, A having regard to the evidence, I am unable to say that, with the exercise of reasonable care and skill, the defendants ought to have known that their roof had been rendered unsafe. It seems to me that they were quite justified in taking the view that their roof had escaped the effects of the blast which was manifest in other directions. That being so, I do not B think that they committed the wrongful act of continuing a nuisance of the existence of which they knew, or ought to have known.

Judgment for the defendants with costs.

Solicitors: *Silverman & Livermore* (for the plaintiff); *Mace & Jones* C (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

NOTE.

HAZEL v. EDWARDS.

F [Reported p .591, *ante*.]

The sentence commencing 7 lines from the bottom of p. 593 should read as follows:

We think the phrase "used or adapted for use" must have relation G to the use or adaptation *contemplated* at the time when the lease was granted *or the licence obtained.*

The words in italics are those inadvertently omitted from the judgment, and the Editors are indebted to GODDARD, L.J., for the amendment.

HICHENS HARRISON WOOLSTEN & CO. *v.* JACKSON & SONS.

[Court of Appeal (MacKinnon and du Parcq, L.JJ., and Bennett, J.), **July 2, 3, 1941.**]

Stock Exchange—Broker and client—Vendor repudiating contract—Broker replacing stock—Broker's claim to indemnity—Principal's duty to broker.

Solicitors were about to levy execution upon a judgment when they received from the daughter of the defendant in the action the certificate of certain stock in the Bristol Waterworks Co., the intention being that the stock should be sold and the proceeds applied in payment of the judgment and costs. The solicitors, the present appellants, then wrote, on their usual headed notepaper, to the respondents, who were stockbrokers on the London Stock Exchange, giving them instructions to sell and enclosing the certificate for the stock and a blank transfer which had been sent to them by the owner of the stock. The respondents thereupon sent a contract note, "Sold for account of Messrs. Jackson & Sons, Miss A. E. Lucas," who was the holder of the stock. The respondents, in fact, sold the stock on the Bristol Stock Exchange, but the original holder, Miss Lucas, subsequently repudiated the contract and asked the Bristol Waterworks Co. to return the certificate. The company thereupon refused to register the purchaser as the holder of the stock. In these circumstances, the respondents, holding themselves bound by the London Stock Exchange Rules, r. 120, to replace the stock and to obtain a clean transfer, sued the appellants to recover their expense in so doing :—

Held : a vendor of stock or shares is under no duty to guarantee that the transfer will be registered by the company. The appellants, having handed to the respondents the certificate for the stock, together with a transfer valid in form, had done all that they could be required to do.

Decision of Viscount Caldecote, L.C.J. ([1941] 1 All E.R. 562) *reversed on this point.*

[**EDITORIAL NOTE.** In this case the Court of Appeal have held that the brokers took too high a view of their duty in the matter. On a sale where the vendor repudiated the transaction, they felt themselves bound to replace the stock, but the Court of Appeal have held that a long line of authority definitely establishes that they are not liable to replace the stock, because the effect in law of their contract is not to guarantee that the transfer shall be registered with the company. The purchaser of shares takes the risk that the company may refuse to register him.

As to Broker's Rights of Indemnity, see HALSBURY, Hailsham Edn., Vol. 31, pp. 590-592, paras. 818-822 ; and for Cases, see DIGEST, Vol. 42, pp. 800-805, Nos. 86-134.]

Cases referred to :

(1) *Stray* v. *Russell* (1859), 1 E. & E. 888 ; 42 Digest 827, *360* ; 28 L.J.Q.B. 279 ; 1 L.T. 162 ; *affd.* (1860), 1 E. & E. 916.

(2) *Skinner* v. *City of London Marine Insurance Corpn.* (1885), 14 Q.B.D. 882 ; 42 Digest 827, *363* ; 54 L.J.Q.B. 437 ; 53 L.T. 191.

(3) *Re London, Hamburg & Continental Exchange Bank, Ward & Henry's Case* (1867), 2 Ch.App. 431 ; 9 Digest 397, *2532* ; 36 L.J.Ch. 462 ; 16 L.T. 254 ; *revsg.* (1866), L.R. 2 Eq. 226.

(4) *London Founders Assocn.* v. *Clarke* (1888), 20 Q.B.D. 576 ; 42 Digest 827, *361* ; 57 L.J.Q.B. 291 ; 59 L.T. 93.

(5) *Smith* v. *Reynolds* (1892), 8 T.L.R. 391 ; 42 Digest 826, *350* ; 66 L.T. 808 ; *affd.* (1893), 9 T.L.R. 494.

(6) *R.* v. *Carnatic Ry. Co.* (1873), L.R. 8 Q.B. 299 ; 9 Digest 402, *2574* ; 42 L.J.Q.B. 169 ; 28 L.T. 413.

(7) *Shropshire Union Railways & Canal Co.* v. *R.* (1875), L.R. 7 H.L. 496; 9 Digest 380 *2412*; 45 L.J.Q.B. 31; 32 L.T. 283; *revsg.* (1873), L.R. 8 Q.B. 420.

(8) *Re Tahiti Cotton Co., Ex p. Sargent* (1874), L.R. 17 Eq. 273; 9 Digest 365, *2326*; 43 L.J.Ch. 425.

A APPEAL by the defendants from a judgment of VISCOUNT CALDECOTE, L.C.J., dated Mar. 12, 1941, and reported [1941] 1 All E.R. 562. The facts are fully set out in the judgment of MACKINNON, L.J.

A. T. Miller, K.C., and *Ivan Horniman* for the appellants.

B *C. R. Havers, K.C.*, and *H. G. Robertson* for the respondents.

Miller, K.C.: The respondents say that, by the rules of the London Stock Exchange, the appellants were under an obligation to replace the stock. They also say that the appellants were under an implied obligation to register, or to get the holder to register. In the first place, C the rules of the London Stock Exchange have nothing to do with the matter. Secondly, a careful perusal of the rules shows that they do not require that which the respondents claim. The transfer was a genuine one, and the signature was admitted. The transfer was accompanied by a valid certificate. As the respondents, through their agents, D sold the stock on the Bristol Stock Exchange, they cannot make the transaction a sale on the London Stock Exchange by sending to the appellants an erroneous sales note describing the sale as having taken place there. In the present case, the transferee could have taken steps to require registration. What was stated by LORD BLACKBURN in *R.* v. E *Carnatic Ry. Co.* (6) would have been the position in the present case, if the transferee had taken the remedy open to him. [Counsel referred to *Shropshire Union Railways & Canal Co.* v. *R.* (7), *Re Tahiti Cotton Co., Ex p. Sargent* (8), PALMER'S COMPANY PRECEDENTS, 15th Edn., p. 602, and HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 1, p. 298.]

F *Havers, K.C.*: The Bristol Waterworks Co. were not in a position to judge the merits of the case. The appellants could have proceeded against Miss Lucas for breach of the authority to sell the stock, because they withdrew the sheriff's officer in consequence of having received her instructions. In the present case, the appellants had a duty to prevent G Miss Lucas from interfering with the registration of the transfer. The respondents are claiming because of a breach of that duty. They claim to be entitled to replace the stock. The seller does not fulfil his duties to the purchaser unless he takes steps to prevent the transferor from doing anything which prevents completion of the transaction. H The appellants refused to do anything, because they considered that the matter was one between Miss Lucas and the purchaser. In the circumstances of the present case, however, there was a duty upon the appellants. When making the contract on the Bristol Stock Exchange, the respondents did not give the name of a principal. Therefore, they would have been liable to be sued personally upon that contract. The appellants were under a duty to the respondents at common law. As the respondents were principals, as between themselves and the purchaser, they were in the same position as if the transaction had taken place on the London Stock Exchange between themselves and a jobber. [Counsel referred to *London Founders Assocn.* v. *Clarke* (4).]

MacKinnon, L.J.: The plaintiffs are a firm of London stockbrokers, and the defendants are a firm of solicitors who practice at Ringwood in Hampshire. In Apr., 1939, the defendants were acting for one of their clients, Etchells, who is landlord of a house in Ringwood, the occupant of which was a Mrs. Lucas. Mrs. Lucas was a very unsatisfactory and tiresome tenant who would not pay her rent. Eventually the defendants obtained judgment for Etchells against Mrs. Lucas for some sum the exact amount of which does not matter, and put in the sheriff's officer, who went into possession.

In a letter dated Apr. 25, 1939, the daughter of Mrs. Lucas wrote to the defendants as follows:

> In order to assist my mother, the defendant in this action [*Etchells* v. *Lucas*] I am willing to surrender the attached shares of the Bristol Waterworks Co., which are at present worth just over their face value, on the understanding that the balance be returned to me after the sheriff's execution is provided for in full.

With that letter she sent the certificate of 250 shares in the Bristol Waterworks Co., made out in her name as proprietor of the shares. The defendants replied to Miss Lucas pointing out that the certificate by itself was no use, that it must be accompanied by a blank transfer, and they said:

> We are enclosing such a transfer herewith. We shall be obliged if you will execute this document in the presence of a witness, who should add his or her name, address and description in the appropriate place on the document. Kindly then return it to us. On return of the document to us we are prepared to advise our client to realise the stock and after satisfaction thereout of the full amount due under the sheriff's warrant to return any balance that there may be to yourself.

Miss Lucas did execute the transfer, and she got the sheriff's officer to witness her signature. That document was then returned to the defendants. Thereupon, having duly received the blank transfer and the certificate for the 250 shares, on Apr. 25, 1939, the defendants wrote to the plaintiffs, who are stockbrokers in London, as follows:

> We enclose herewith certificate for £250 consolidated ordinary stock in the Bristol Waterworks Co., together with blank transfer duly executed. We shall be obliged if you will realise the stock for the best price obtainable and let us have cheque in due course.

The plaintiffs, finding no reasonable market in London for shares of the Bristol Waterworks Co., communicated with a firm of stockbrokers at Bristol, Messrs. Evans. As a result of those communications, Messrs. Evans sold the 250 shares in the Bristol Waterworks Co. for something like £360, and on Apr. 26 rendered a sold note to the plaintiffs as follows:

> To Messrs. Hichens Harrison & Co. We beg to advise having sold on your account subject to the rules of the Stock Exchange, for settlement May 11, 1939: £250 Bristol Waterworks Co. consolidated ordinary stock at 147½ gross, £368 15*s*. Signed, E. F. Evans & Co., Members of the Stock Exchange, Bristol.

Their reference to the rules of the Stock Exchange must, presumably, mean the rules of the Bristol Stock Exchange, but I do not think that anything in particular turns upon that. In due course, having received that document, or knowing the terms of that sale, the plaintiffs rendered to the defendants a sold note of the same date in these terms:

A Sold for account of Messrs. Jackson & Sons. Miss E. A. Lucas. Commission divisible with above firm. £250 Bristol Waterworks Co. consolidated ordinary stock at £147 6*s.*, £368 5*s.* To a non-member. Settlement May 11, 1939. Commission £1 16*s.* 10*d.*; contract stamp, 1*s.*; £1 17*s.* 10*d.*, £366 7*s.* 2*d.* Subject to the rules and regulations of the London Stock Exchange.

The words "Miss E. A. Lucas," as the judge rightly found, were only B put in to identify the transaction. They then sent their cheque for that sum of £366 7*s.* 2*d.* to the defendants. The defendants paid off Etchells' debt out of that sum, and sent a cheque for the balance, some £150, to Miss Lucas, and the whole transaction would then appear to have been successfully concluded.

C Meanwhile Mrs. Lucas appears to have intervened and put some pressure on her daughter, who began writing letters saying that all this was done under duress and raising other irrelevant contentions. The upshot of this was that difficulty arose when Fry, who was the client of Messrs. Evans, and the real purchaser of these shares—Messrs. D Evans had sold to a firm of accountants who were acting for Fry—went to the Bristol Waterworks Co. to get the shares registered in his name. It appeared that Miss Lucas, or Mrs. Lucas, or both of them, had written to the Bristol Waterworks Co., as Mrs. Lucas put it, stopping "the sale of my daughter's shares." Miss Lucas, on being E pressed about this, wrote to the company on June 4 as follows:

My signature on the transfer deed is authentic, but it was obtained under fraud and compulsion.

Thereupon the company took up the attitude that, if there was this suggested *caveat* against the registration of this transfer, they would F hold up the registration of Fry until the matter was settled, and they wrote to the plaintiffs on June 12 as follows:

Registration must be deferred until all doubts concerning the matter have been dispelled. I need hardly say that my company will readily abide by any arrangement reached between the parties or any order which the court may make.

Thereupon correspondence ensued between the plaintiffs and the G defendants as to how this difficulty was to be got over. The defendants were apparently not quite certain about the legal position. They asked for the matter to stand over while they considered it and took counsel's opinion.

Finally, on July 1, the defendants wrote to the plaintiffs as follows:

H We have received counsel's opinion to-day and we hasten to acquaint you of his views. Counsel's opinion is to the effect that the matter is one entirely between the purchaser of the stock and Miss Lucas herself and that the proper course to be adopted is for the purchaser to institute proceedings against Miss Lucas, as he is of the opinion that our client, Mr. Etchells, is not under any obligation to the purchaser in the matter.

To that the plaintiffs replied on July 3 as follows:

We thank you for your letter and shall be glad if you will send us a copy of the case

> you sent to counsel. We may mention, however, that the purchaser is not our client, but is a member of a stock exchange and, according to the rules of the [London] Stock Exchange, the buying broker will, in default of delivery of the stock, buy in against us as your agent. Any loss involved in this transaction will be payable by you as our principal.

The defendants wrote in reply that they did not agree with that suggestion, but, after some further letters, on July 11 the plaintiffs purchased from another dealer somewhere else another block of 250 Bristol Waterworks Co. ordinary stock, sent it to Messrs. Evans to be handed on to Fry, and got back from him the original certificate and the original transfer. The plaintiffs then started these proceedings against the defendants for the return of the £366 paid to them pursuant to the transaction which had become abortive.

Para. 3 of the statement of claim alleged as follows:

> By reason of their said instructions to the plaintiffs [the letter sending the blank transfer and security and order for sale], the defendants (*a*) impliedly warranted and agreed with the plaintiffs that they had the right to sell and dispose of the said stock and that they and the said Miss A. E. Lucas would do nothing to prevent the transfer of the said stock to a purchasor thereof or to prevent the Bristol Waterworks Co. registering the purchaser as the holder thereof, and (*b*) were under the duty to the plaintiffs to take all steps necessary to procure such registration.

Then in para. 4 the plaintiffs rely upon certain rules of the London Stock Exchange. When asked for particulars of those rules, they specified certain rules which seem to me to have absolutely nothing to do with this case. The first rule to which they referred is r. 11, which provides as follows:

> In all cases brought under the consideration of the committee, their decision, when confirmed, shall be final and must be carried out forthwith by every member concerned.

That is utterly irrelevant, because the committee were never consulted in this matter and never had anything to do with the case. Then reliance is placed on r. 16 (2), which also refers to the powers of the committee. As I have said, the committee never had anything to do with this transaction. Then they referred to r. 73, which provides as follows:

> The Stock Exchange does not recognise in its dealings any other parties than its own members; every bargain therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the rules, regulations and usages of the Stock Exchange.

That does not seem to apply, because this was not a transaction between two members of the London Stock Exchange at all. Rule 77, to which they also referred, provides that a non-member may make a complaint against a member, which may be referred to the committee. Again, however, nothing of that sort has happened. The only rule which can be said to be at all relevant, and upon which also reliance is placed, is r. 120 (1), which provides as follows:

> The seller of securities is responsible for the genuineness and regularity of all documents delivered.

The whole basis of this claim rests on the allegation that it was the duty of the defendants, not merely to hand over a transfer valid in form with a certificate for the shares, but also to secure or guarantee that that transfer would eventually be registered by the company in the name of the purchaser. If that is the alleged basis of the defendants' duty upon which this claim is based, I think that it is contrary to the law as laid down uniformly by a series of cases which began as long ago as 1859. In that year in *Stray* v. *Russell* (1), Lord Campbell, C.J., in the course of his judgment said, at p. 901 :

> What does the vendor [the vendor of the shares] contract to sell and deliver ? Genuine transfers and certificates, with the interest and rights which they convey. There might be a condition subsequent, imposing upon the vendor the onus of procuring the consent of the directors to the transfers ; but I can find no evidence of such a condition.

Then he develops that and decides that there was no breach by the vendors in a case where they had handed over, as the defendants handed over in this case, a genuine transfer and a genuine certificate, but the trouble which arose was that there was a difficulty and a refusal by the directors to register the purchaser in accordance with the transfer executed by the vendor. That was in 1859.

That was followed in 1885 in *Skinner* v. *City of London Marine Insurance Corpn.* (2). That, again, was a case where the purchaser of shares was complaining that he had failed to become registered by the company under a transfer of shares handed to him by the vendor. In regard to that, Brett, M.R., stated the principle thus, at p. 887 :

> That, therefore, raises the question what is the ordinary contract by the seller on a bargain and sale of registered shares of a company. It seems to me that the only contract in such a case is that the seller shall execute a valid transfer of the shares and hand the same over to the transferee . . .

Of course, if he is the registered holder of the shares, those words are precise in their statement that he should execute it, but it clearly also includes handing over a transfer of the shares validly executed by the previous holder. Brett, M.R., continued as follows, at p. 887 :

> . . . and so do all that is necessary to enable the transferee to insist with the company on his right to be registered a member in respect of such shares.

That is in accordance with what was laid down by Lord Cairns in *Re London, Hamburg & Continental Exchange Bank, Ward & Henry's Case* (3) which is another case, to which I have not referred.

Yet again in *London Founders Assocn.* v. *Clarke* (4) the same point arose. Lord Esher, M.R., cited the previous cases, including *Stray* v. *Russell* (1), and said at p. 582 :

> The purchaser might have a remedy against the company, but I do not think that the vendor does undertake that the company will accept the purchaser so as make himself responsible for their refusal to do so. The purchaser takes that risk on himself, and the sellers' liability is satisfied by handing to the purchaser the transfer and certificates of the shares in proper form, and doing nothing either before or subsequently to prevent the registration of the purchaser.

There is all that concurrent authority as regards the common law duties of the vendor and purchaser of shares.

Assuming, though I need not decide the point, that this part of the London Stock Exchange Rules, r. 120, does apply in this case, I think that it adds nothing to the position as it would be if that rule were inapplicable. It merely says that the seller of securities is responsible for the genuineness and regularity of all documents delivered. That is merely saying, as was said by the judges from the common law point of view, that the vendor must hand over a genuine certificate and a genuine and valid transfer. It does not add anything in the way of obligation upon the vendor to procure that the company shall register the transfer when it is handed over. Those authorities seem to me to show clearly that there was no duty upon these defendants by which they in any way guaranteed that the transfer should be registered by the company. That, as Lord Esher, M.R., said, was a risk which the purchaser took upon himself.

It has been pointed out to us that there would have been a very simple method—this does not happen to be a company within the Companies Acts, in which there is even more simple machinery—open to Fry—namely, to start an action of *mandamus* under R.S.C., Ord. 53, against Miss Lucas, to which there could have been no defence, and in which he would have secured his registration as proprietor of these shares, and would undoubtedly have recovered his costs against that misguided woman.

In his judgment, Viscount Caldecote, L.C.J., cites more than one of those passages in the authorities which I have myself read. He refers to *London Founders Assocn.* v. *Clarke* (4), and he quotes the passage which I read from p. 582. He also quotes the extremely apposite passage in *Skinner* v. *City of London Marine Insurance Corpn.* (2), where Brett, M.R., said, at p. 887 :

> It seems to me that the only contract in such a case is that the seller shall execute a valid transfer of the shares and hand the same over to the transferee, and so do all that is necessary to enable the transferee to insist with the company on his right to be registered a member in respect of such shares.

Having cited those two cases, which seem to me to lay down the legal position with absolute clearness, he goes on to refer to *Smith* v. *Reynolds* (5), which seems to me to have very little bearing upon the matter, except that it apparently established that the rules of the London Stock Exchange were reasonable, and could be properly imported into transactions carried out on the Stock Exchange. Finally, he concludes by saying ([1941] 1 All E.R. at p. 568) :

> . . . in the light of the decision in *Smith* v. *Reynolds* (5) . . . in my judgment, the defendant firm is liable upon the principle which was stated by Lord Esher, M.R., in *Smith* v. *Reynolds* (5), to which I have just referred.

I can understand that only as meaning that r. 120 would justify the plaintiffs in purchasing these shares against the defendants and demanding repayment of the price of them, and that that rule was in *Smith* v. *Reynolds* (5) held to be a reasonable rule. I do not follow that reasoning. The true principle of law involved in this case is, I think, that laid down by Lord Campbell, C.J., and Lord Esher, M.R., in the passages which I have cited, which seem to me to show conclusively that there was no such duty cast upon the defendants as must be suggested as the basis of this claim against them in this action. In the result, I think that this appeal succeeds, that the judgment must be set aside and that there must be judgment for the defendants with costs.

du Parcq, L.J.: I agree and, as we are differing from the conclusion reached by Viscount Caldecote, L.C.J., I will add a few words. It is clear that the defendants performed their duty when they handed over to the plaintiffs, acting for the transferee, a duly executed transfer, together with the certificate. They were under no duty to procure the registration of the transfer, and it is not contended that they were. As is said in Palmer's Company Precedents, 15th Edn., p. 602, if the buyer wishes to protect himself, he must see that registration is guaranteed. No doubt the sellers are always under a duty to do nothing to prevent the registration of the purchaser. Where it is necessary for a seller to do certain things or execute certain documents in order that delivery may be completed, it is plainly necessary to imply a term in the contract that he will not do anything tending to nullify those acts or documents. In my opinion, however, it is neither necessary nor possible, where the seller is not himself the transferor, to imply any warranty such as that pleaded in para. 3 of the statement of claim—namely, that the transferor will do nothing to prevent the transfer of the stock. Counsel for the respondents was unable to find any authority to support that plea, and I think that the proposition involved in that is not only without support from authority but also wrong in principle. It cannot be said that such an implied warranty must be read into the contract in order to give it business efficacy. On the contrary, the attempt to import such a term can only increase the difficulties of business men. On those short grounds, I agree that the appeal must succeed.

Bennett, J.: I also agree. I respectfully agree with the conclusion of Viscount Caldecote, L.C.J., that, in the transaction which is being investigated, the defendants were acting as principals, and not as agents. It seems to me that, upon the documents, that conclusion was abundantly justified. Upon that footing, as it seems to me, the case stands in this way. The defendants as principals instructed the plaintiffs as their agents to find a purchaser for some stock. The plaintiffs found a purchaser for the stock, and thereupon the defendants had to perform certain duties in connection with that transaction. It is alleged in para. 3 of the statement of claim that the duty of the defendants was to take all necessary steps to procure the registration of the transfer of the stock in question. Counsel for the respondents has not put the duty as high as that. As he submitted, the duty under which the defendants came, in the circumstances, was, as regards Miss Lucas, to see that she did nothing to prevent or interfere with the registration of the transfer. He cited no authority in support of that proposition, and indubitably it is an extension of the principle which is laid down in the authorities to which MacKinnon, L.J., has referred, and as stated in Palmer's Company Precedents, 15th Edn., p. 602, where the duty is said to be to hand over to the transferee a duly executed transfer, together with the certificate or its equivalent. Unless there is support for the proposition or the extension of the proposition for which counsel for the respondents contended, in my view, there is no foundation for the plaintiffs' action. For these reasons, I agree with MacKinnon and du Parcq, L.JJ., in their view that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Hair & Co.* (for the appellants); *Roney & Co.* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

CAMKIN *v.* BISHOP AND ANOTHER.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **July 3, 4, 1941**.]

Education—Schoolmaster—Negligence—Provision of supervision—Boys helping on farm—Injury to boy's eye.

On their half-holiday, a number of boys from a school were allowed by the headmaster to help a farmer by working in a field. As a result of horseplay among some of the boys, the infant plaintiff was struck on the forehead by a clod of earth, and one of his eyes was so badly injured that it had to be removed. In an action for damages for negligence against the headmaster, it was contended that he was under a duty to arrange for the supervision of the boys while they were doing the work :—

HELD : in the circumstances of this case, the headmaster owed no duty to the infant plaintiff or his father to provide for the supervision of the boys.

[**EDITORIAL NOTE.** The provision of supervision in schools is a matter in which the practice of headmasters varies very considerably, with the result that it may have become a question whether the meticulous practice of some headmasters in this regard has placed a duty on others to provide more supervision than they normally would. The observations in the Court of Appeal herein will, therefore, be of considerable assistance to headmasters and those called upon to advise them, although it must not be overlooked that those observations are necessarily directed only to the facts of the present case.

AS TO LAW AFFECTING SCHOOLMASTERS, see HALSBURY, Hailsham Edn., Vol. 12, pp. 137-139, paras. 295-297 ; and FOR CASES, see DIGEST, Vol. 19, pp. 598-600, Nos. 263-282.]

APPEAL by the defendant from a judgment of CASSELS, J.; dated Mar. 17, 1941. The facts are fully set out in the judgment of SCOTT, L.J.

Gilbert Paull, K.C., and *J. F. Bourke* for the appellant.

Maurice Healy, K.C., and *A. P. Marshall* for the respondents.

SCOTT, L.J. : This is an appeal by the defendant from a judgment of CASSELS, J., awarding £750 damages to the infant plaintiff and £64 to his father against the defendant, the headmaster of King's School, Warwick, where the infant plaintiff was a boarder. The action was for damages for negligence whereby personal injury was caused to the boy and the father was obliged to incur special damages for medical and other expenses.

The action arose out of the shortage of agricultural labour caused by the war. To help the farmers, the Ministry of Agriculture in the spring of 1940 asked the war agricultural executive committee of the county to get into touch with local schools for older boys to enlist the sympathies of the headmasters and persuade them to allow their students to volunteer either to go into regular holiday camps during the harvest months or to offer their services during the summer term on half-holidays for work on local farms. On July 6, 1940, a company of 22 boys from the school volunteered for farm service on that afternoon at a farm a few miles away from the school. They went over with the senior boy of the group apparently in authority, in accordance with the regular system of the school, but not accompanied by any master. It was the habit of the school authorities, in accord with the ordinary public-school tradition of Great Britain, to allow the boys latitude on half-holidays, with complete freedom to go anywhere they liked within a radius of 8 miles, in small or in large groups as they chose, and unaccompanied by masters to supervise or control them.

The 22 boys, including the infant plaintiff, aged 14½ years, who volunteered to work on the farm on the day in question, were allowed to go on their own responsibility in the usual way, the senior boy, I gather, being tacitly recognised as their leader. They were to receive 6*d.* per hour for their work, the wages being paid to the school for them.

During the afternoon in question, the farmer started them on their work and then left them to carry on. During his temporary absence, some of the boys began playing the fool and throwing potatoes at each other and they continued ragging for 30 or 40 minutes. At the end of this time, one boy called out something opprobrious to another boy which angered the latter, who replied by throwing a lump of earth at his insulter, who ducked his head and escaped the missile, which most unfortunately hit the infant plaintiff, who was hoeing beet, on the side of the forehead, and so gravely injured his eye that it had to be enucleated next day by a surgeon, with the result that the infant plaintiff will be one-eyed for life.

The father then brought an action against the headmaster for negligence, alleging (i) that it was the duty of the headmaster to send a master in charge of the boys to prevent them from indulging in such horseplay, (ii) that his failure to do so was negligence, and (iii) that that negligence was the cause of the injury suffered. The substance of the defence was that these allegations disclosed no cause of action. I entirely agree with the defence. The whole action is misconceived and ought never to have been brought. I cannot understand how the judge came to think that either the statement of claim or the plaintiff's evidence disclosed any cause of action. The defendant's counsel might have submitted at the close of the plaintiffs' case that no case had been made out, and have asked the judge to rule accordingly. As he did not, the unfortunate headmaster was put into the position of having to go into the witness box and justify his action when it needed no justification. The defendant, as headmaster, owed no duty to the boys to refuse to let them go to help the farmer in his need of labour without an under-master, or an under-nurse for that matter, in charge. The incident might have happened just as easily on a natural history expedition, or on any other country outing, on which the boys were regularly allowed to go without supervision. Indeed, it might have happened even if a master had gone for he might have been temporarily absent and the two boys who quarrelled might have done so during his absence.

The first witness called for the plaintiffs was the assistant executive officer of the Warwickshire War Agricultural Executive Committee, whose evidence was tendered for the purpose of putting in a document which had no direct relevance to the allegations in the statement of claim, but part of which had been read by counsel for the plaintiffs in his opening speech. The document was a long communication from the Ministry of Agriculture to all county war agricultural executive committees. It related mainly to the scheme for holiday camps, but contained a paragraph about local half-holiday assistance by schoolboys to farmers in the neighbourhood, in which it was said that in most cases small parties of boys should be sent on to farms in charge of a master or a prefect in each case. This expression of opinion by the Ministry of Agriculture was obviously concerned only with the agricultural efficiency and usefulness of the boys' labour, and had nothing whatever to do with any possible danger to the boys in the absence of control. It could not be evidence of any duty owed by the headmaster to the boys concerning their safety, but it seems to have affected the mind of the judge. In truth, there was no evidence that the document was shown to the defendant or that the sentence in question was read to him, or even to the two assistant masters to whom the defendant had delegated the duty of carrying out the plan of allowing the boys to volunteer for agricultural work. There is nothing, therefore, in the point made before us by counsel for the respondents that the assistant masters had not been called in spite of the threat of counsel that he would comment severely if they were not called.

The reality of the whole position was that the boys volunteered for the work, that the farmers were glad to have them, and did not ask for masters to supervise them, that the boys knew that they were to be under the farmers' orders, and that, in general, they gave satisfaction. No duty at common law of the kind alleged ever arose. The judgment below must be set aside with costs here and below. I will ask GODDARD, L.J., at the request of CLAUSON, L.J., to read the next judgment.

GODDARD, L.J.: I agree that this appeal should be allowed. The question we have to determine is whether there was any breach of duty by the headmaster, his duty being that of an ordinary careful parent. I ask myself whether any ordinary parent would think for a moment that he was exposing his boy to risk in allowing him to go to a field with others to weed beet or lift potatoes, occupations far safer than bicycling about on the roads in these days.

I confess that I have some difficulty in appreciating the view taken by the judge. He found that the defendant failed in his duty by reason of a lack of supervision. If this means anything, it must mean that it is the duty of a headmaster to see that boys are always under supervision, not only while at work, but also at play, or when they are free, because at any time they may get into mischief. I should like to hear the views of the boys themselves on this proposition. Would any reasonable parent forbid his boy of 14 to go out with his school-fellows because they might possibly get up to mischief, as all boys will at times ? Here at this school on free afternoons the boys are allowed out, their bounds being some 8 miles, and they are left to themselves, provided they are back by a certain hour. No complaint is made of this freedom. If there is nothing wrong in that, how can it be wrong to let a boy go with others to such a harmless occupation as doing some farm work of the most innocuous character ? As Clauson, L.J., put it during the argument, if the headmaster is not guilty of any breach of duty in allowing the boys to go off for walks and so on by themselves, how can he become liable because during the walk they go and work in a field and meet with some accident while thus engaged ? If he is liable in this case, so will he be if some boy does a mischievous act in the playing field which injures another while a master or prefect does not happen to be present, or while out for a walk climbs a tree and breaks his legs.

The judge seems to have paid great attention to the circular from the Ministry of Agriculture about schoolboys working on farms. Apart from the fact that it was never proved to have been brought to the notice of the headmaster, I cannot see the relevancy of it. Officials of the Ministry of Agriculture are not the persons to tell headmasters how to run their schools. It is obvious that all the passage so often referred to was dealing with was that it might be as well to have some responsible person present to see that the boys did the job for which they were being paid, a task which one would suppose would also be undertaken, at least to some extent, by the farmer who was paying them. Indeed, the evidence of the boy Ives shows that that is just what did happen on one occasion at least at Hobbs' farm. The views of some gentleman at the Ministry of Agriculture who may well be anxious that farmers should get value for their money cannot have any bearing whatsoever on the duty a master owes to his pupils. Nor was there any duty on the master to ask the farmer to supervise the boys for their safety. How could it occur to anyone that there was any danger in the occupation ? If every master is to take precautions to see that there is never ragging or horseplay among his pupils, his school would indeed be too awful a place to contemplate. Of course there was no supervision on this occasion. Nor was there any duty to provide it, having regard to the innocuous nature of the occupation. This case bears no anology to those in which boys have been allowed to handle dangerous chemicals or to be in proximity to dangerous machinery. There was no evidence, in my opinion, of any breach of duty whatever.

It was not objected at the trial that the plaintiffs had made no case, I dare say because it was thought desirable to put the defendant into the box. His answers showed him to be transparently frank. Boys of 14 and 16 at a public school are not to be treated as if they were infants at creches, and no headmaster is obliged to arrange for constant and perpetual watching out of school hours. For one boy to throw something at another is an ordinary event of school life, but the fact that there was in this particular case a disastrous and wholly unexpected result is no reason for throwing responsibility on the master. I agree with SCOTT, L.J., that this is an action which ought never to have been brought.

CLAUSON, L.J.: Agreeing completely, as I do, with the judgments of SCOTT and GODDARD, L.JJ., I consider that it would be superfluous for me to add anything, save that I concur in allowing the appeal.

Appeal allowed with costs in both courts.

Solicitors: *William Hurd & Son*, agents for *Buller, Cross & Jeffries*, Birmingham (for the appellant); *Waterhouse & Co.*, agents for *Hatwell, Pritchett & Co.*, Birmingham (for the respondents).

[*Reportedby* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

SCOTT *v.* SEYMOUR.

[COURT OF APPEAL (MacKinnon, Luxmoore and du Parcq, L.JJ.), **June 26, 27, 1941.**]

Workmen's Compensation—Accident—Domestic servant taking master's tea to field—Riding horse back to farm—Injuries received when horse bolted—Whether accident arose out of employment—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1).

The appellant was employed by a farmer as a domestic servant. She had taken his tea to a field about two miles away from the farmhouse and was returning with the empty can. One of the farm horses was returning to the farm, and the appellant mounted the horse to ride back to the farmhouse. The horse bolted and the appellant was thrown and sustained serious injuries, in respect of which she claimed compensation. It was admitted that the accident occurred in the course of her employment but it was contended that the accident did not arise out of her employment:—

HELD: on the facts as found by the county court judge, the only possible conclusion is that the accident arose out of, as well as in the course of, the employment, and, therefore, the claim for compensation must be allowed.

[**EDITORIAL NOTE.** The question here is whether the accident arose out of the employment and in the decision of this matter it has to be determined whether the act of the workman causing the accident was one which she was impliedly authorised by her employer to do. Upon this the Court of Appeal has come to a different decision on the facts from that reached by the county court judge. It will be noted that in the present case there was no breach of any rule or regulation made by the employer. The question is purely whether it was reasonable in the circumstances for this girl to mount the horse instead of walking back to the farmhouse. The county court judge appears to have based his decision on the fact that the girl rode the horse because she enjoyed riding, rather than for the purpose of getting back to the farmhouse. The Court of Appeal has, however, shown that, in the circumstances of this case, the authorities show that motive is immaterial and should not be taken into account in deciding whether the accident arose out of the employment.

AS TO ACCIDENTS ARISING OUT OF THE EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 840-846, paras. 1172-1174; and FOR CASES, see DIGEST, Vol.

34, pp. 284-297, Nos. 2389-2470. See also WILLIS'S WORKMAN'S COMPENSATION, 33rd Edn., pp. 55-75.]

Cases referred to :

(1) *Seviour* v. *Somerset Collieries, Ltd.* [1940] 1 All E.R. 649; Digest Supp.; 162 L.T. 403; 33 B.W.C.C. 62.

(2) *Noble* v. *Southern Ry. Co.*, [1940] A.C. 583; [1940] 2 All E.R. 383; Digest Supp.; 109 L.J.K.B. 509; 33 B.W.C.C. 176.

(3) *Barnes* v. *Nunnery Colliery Co., Ltd.*, [1912] A.C. 44; 34 Digest 299, *2489*; 81 L.J.K.B. 213; 105 L.T. 961; 5 B.W.C.C. 195.

(4) *Harris Associated Portland Cement Manufacturers, Ltd.*, [1939] A. C. 71; [1938] 4 All E.R. 831; Digest Supp.; 108 L.J.K.B. 145; 160 L.T. 187; 31 B.W.C.C. 434.

(5) *Plumb* v. *Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62; 34 Digest 288, *2415*; 83 L.J.K.B. 197; 109 L.T. 759; 7 B.W.C.C. 1.

(6) *Riley* v. *Wearmouth Coal Co., Ltd.*, [1940] 4 All E.R. 342; Digest Supp.; 33 B.W.C.C. 316.

(7) *Race* v. *Postmaster-General* (1932), 146 L.T. 489; Digest Supp.; 25 B.W.C.C. 24.

(8) *Stephen* v. *Cooper*, [1929] A.C. 570; Digest Supp.; 98 L.J.P.C. 97; 141 L.T. 300; 22 B.W.C.C. 339.

(9) *Borley* v. *Ockenden*, [1925] 2 K.B. 325; 34 Digest 314, *2573*; 95 L.J.K.B. 35; 133 L.T. 72; 18 B.W.C.C. 55.

APPEAL by the applicant from an award of His Honour JUDGE RICHARDSON sitting at the Newcastle-upon-Tyne County Court, dated Mar. 11, 1941, and reported [1941] L.J.N.C.C.R. 59. The facts, which were not in dispute, are fully set out in the judgment of MACKINNON, L.J.

C. S. Rewcastle, K.C., and *R. Ritson* (*W. Sexton* with them) for the appellant.

F. A. Sellers, K.C., and *Harry Samuels* for the respondent.

Rewcastle, K.C.: On the facts of the present case, it is quite plain that the appellant was working in the course of her employment when the accident occurred. It is also plain that the accident arose out of her employment. She was carrying out a duty which she had been expressly ordered to perform. The appellant was accustomed to riding horses. It was not improper for her to ride a horse. She did it without any objection being made by the master. It is true that the man in charge of the horse objected at first, but eventually he assisted her to mount the horse. This was quite an ordinary risk of the appellant's employment, since to ride home on the horse was a reasonable way of doing that which she was employed to do. The only distinction which can be drawn between the present case and *Seviour* v. *Somerset Collieries, Ltd.* (1) is that in the present case the appellant, at the time of the accident, was doing something which was reasonable and likely to be safe, whereas in *Seviour's* case (1) the man was doing something likely to be dangerous. *Riley* v. *Wearmouth Coal Co., Ltd.* (6) also supports the appellant's case. *Noble* v. *Southern Ry. Co.* (2) shows that the motive which induces a person to do a thing is not material.

Sellers, K.C.: The words of LORD LOREBURN in *Barnes* v. *Nunnery Colliery Co., Ltd.* (3) are as applicable now as they were when they were uttered. LORD LOREBURN said in that case that the more he saw of cases under the Workmen's Compensation Act, 1925, the more he saw that they were all questions of fact. The problem which arises under the Workmen's Compensation Act, 1925, is one with which the legislature intended the county court judge to deal. The Court of Appeal will not distrub the findings of the county court judge unless he has misdirected himself. *Seviour* v. *Somerset Collieries, Ltd.* (1) was a case in which the judge misdirected himself. In the present case, there is no ground of law upon which it can be said that the county court judge has misdirected himself. In *Noble* v. *Southern Ry. Co.* (2), there is nothing which affects the decision in *Race* v. *Postmaster-General* (7) or the decision of the county court judge in the present case. In riding the horse back to the farm, the appellant in the present case was arrogating to herself the duties of the man in charge of the horse. The case is akin to a guard performing the duties of an engine-driver. *Seviour* v. *Somerset Collieries, Ltd.* (1) is a case decided under sect. 1 (2) of the Act of 1925. The present case was decided under sect. 1 (1), which is the relevant subsection. The county court judge has held that it was not part of the appellant's employment to return to the farm in the particular method which she chose. A workman cannot increase the responsibilities of his employers by doing something for his own purposes: Willis's Workmen's Compensation, 33rd Edn., p. 57. [Counsel referred to *Stephen* v. *Cooper* (8), *Noble* v. *Southern Ry. Co.* (2) and *Borley* v. *Ockenden* (9).]

MacKinnon, L.J.: The workman in this particular case was a girl of 15 to 16 years of age. The facts really were not in dispute. The girl was employed as a domestic servant by a farmer. She was herself the daughter of a farmer and had lived all her life on farms. On the afternoon of Sept. 5, 1939, she was told by the farmer's wife to take a can of tea to the farmer, who was working two miles away in a field. She took the tea to the farmer, and waited until he had consumed it, when it was her duty to take the empty can back to the farm. She proceeded to take the empty can back to the farm and, while on that passage by the most direct route, so far as there is any evidence, she met with this accident. In those circumstances she claimed that she was a workman who had sustained personal injury arising out of and in the course of her employment, and that, therefore, she ought to receive compensation. There was no question at all in the county court but that this accident arose in the course of her employment. The dispute was whether it arose out of her employment, and that dispute rested upon a further circumstance which I have not mentioned so far—namely, the method of locomotion by which the girl was returning from the field to the farm. There was a horse, or there were horses, in this field two miles away, and they were, or one of them was, going back to the farm, the very destination to which she was going. She accordingly asked the man in charge of the horse, or horses, if she might ride one of them. He knew that she had been accustomed to horses as a farmer's daughter, and he let her do so. He did mention that the farmer did not like even his own daughter riding the horses, and that the farmer (using a charming phase in the vernacular, which I am glad to know of) " would play war." It was also in evidence, however, that, when she had ridden the very day before, the farmer had seen her and had not "played war," or made any objection. She got up on the horse, or was helped on to the horse by the man, and started to ride back to the farm. The horse was startled and reared, or otherwise misbehaved itself, and the girl fell off. Then, most unfortunately, her feet got caught in a chain which was on the horse's harness—it had been harnessed to a plough—and, when the horse ran on, she was dragged along the ground and sustained these very serious injuries.

Those are the whole of the undisputed facts. The question which arose upon those facts was whether, the accident clearly having arisen in the course of her employment, it arose out of her employment. The material findings of the judge, I think, are these :

> It was part of her duty to go back to the farm with the empty tea can. It was a considerable distance away.

I might add that it was probably a hot day, as it was on Sept. 5. The judge continued as follows :

> The horse was returning to the farm, and she liked riding, and could handle a horse. It was not, on the face of it, an obviously reckless or dangerous way of returning to the farm.

He then says :

> Is not the real and first question which I have to answer this : was the applicant in fact engaged in performing her duty to her master when she met with her terrible accident ? . . . Was she rightly or wrongly riding the horse in order to take the tea-can home, or was she riding the horse for some personal reason, " some frolic of her own ?"

He answers that a few lines later :

> It was not part of her duty to ride a horse, and, therefore, an accident arising from such a ride cannot, it seems to me, be brought into her employment simply because she had in the course of that employment to cover the same two miles which the horse had to travel.

Therefore, he comes to the conclusion that it did not arise out of her employment, and that it was a frolic of her own. Looking at the facts as proved, I think that it is impossible to find that this accident did not arise out of her employment within the terms of the Act. I think that that conclusion, upon those facts, is obviously erroneous. It was part of the girl's duty, which she was fulfilling, to go back to the farm taking this utensil with her. If she had walked and had been knocked down by the horse on the way, quite clearly she would have recovered. If she had borrowed a bicycle from one of the farm-hands, being able to ride a bicycle, and had been hurt by a motor car on the way home, similarly, I should think, there could be no doubt that she would have recovered. If there had been a farm cart attached to this horse and she had asked the man if she might have a lift back to the farm upon the cart, and if she had got into the cart and the horse had bolted and upset the cart, there could be, I should think, no arguable case that she would not have been entitled to recover. I cannot see that it makes any difference that, instead of getting into a cart, she, being able to ride the horse, got on the horse to ride back.

Various cases have been cited to us. As I have said, I think it would A be possible, owing to the industry which reporters and textbook writers have bestowed upon this Act, to find some case or some sentence in support of the most obviously fallacious argument which could ever have been adduced in the hearing of these cases. I do not think it necessary to refer to any of the cases. It would be very remarkable B if this girl failed to recover whereas the claimant in *Seviour* v. *Somerset Collieries, Ltd.* (1) was entitled to recover. There the claimant was not doing so safe a thing as riding a horse along a country lane. He was riding in a truck full of coal along an underground passage in a mine, where the roof was very often so low that anybody who was riding would C knock his head, as happened to him. Moreover, he was doing that in defiance of a rule issued by his employers that nobody was allowed to ride in that way. None the less, it was held that he was entitled to recover under the provisions in the proviso to sect. 1 (2) of the Act of 1925 that a man is still deemed to be acting in the course of his employ- D ment even if he is acting without instructions or in contravention of any statutory or other regulation. Nobody forbade this girl to ride the horse, and counsel for the respondents says that that subsection does not apply, because it applies only when one is doing something in contravention of an order. It would be a very remarkable thing E if disobedience to an order should give a cause of action whereas accepting the permission to do something deprived one of it because it is said that one is doing it as a frolic of one's own. As I say, Seviour's frolic in flat disobedience to the orders of his employer gave him a cause of action, but this girl's frolic, which was with the permission of—or, at any F rate, not against the prohibition of—her employer, it is said, deprives her of any right to recover. I think that, upon these facts, there was only one conclusion to which the judge could possibly come, and there was no evidence upon which he could properly hold that this accident did not arise out of the girl's employment. In the result, I think that G the appeal must be allowed.

LUXMOORE, L.J.: I agree that the appeal should be allowed. The sole question to be determined is whether the appellant's accident arose out of her employment, because it is admitted that it arose in the course H of her employment. The question whether an accident arises out of a person's employment is one of fact in each case, and it has been so held many times. The latest reported case is *Noble* v. *Southern Ry. Co.* (2). In that case, VISCOUNT MAUGHAM said, at p. 591 ([1940] 2 All E.R., at pp. 386, 387), that there were three questions which ought to be considered in cases where there has been a contravention by an injured workman of some regulation or order, but the first of those questions appears to be of general application :

> First, looking at the facts proved as a whole, including any regulations or orders affecting the workman, was the accident one which arose out of and in the course of his employment.

Here the facts were that the appellant had taken out a can of tea to her master. It was her duty to wait while he had his tea and bring the empty can back to the farm where she worked. She was in the course of performing the latter part of her duty when she persuaded a farm-hand, who was in charge of the farm horses, to let her ride one of them back to the farm. The county court judge found that she was accustomed to horses and enjoyed riding them. The accident occurred while she was riding the horse back to the farm, but through no fault of her own. It was entirely due to the interference of one of the farm-hands. In these circumstances, I should have thought that the proper conclusion to draw was that she was riding the horse on her way back to the farm with the empty tea-can, it being her duty to return with it, and, as the accident happened in those circumstances, it was within the scope of her employment, and, therefore, arose out of it. The county court judge refused to accept this view and found that her riding of the horse was, as he terms it, a " frolic of her own." I fail to appreciate the ground for this conclusion, and think that there was no evidence to justify it. The case would have been different if the judge had found that she was riding the horse, not as a means of returning to the farm, or in the course of such returning, but for a ride in some other direction, wholly unconnected with any of her duties. The difficulty in the case may be due to the fact that horse-riding is an unusual mode of progression for a female domestic servant. Suppose that the appellant, being able to ride, had mounted a bicycle instead of a horse. Could anyone have said that, if an accident had occurred on her way back to the place of employment, such a method of progression was outside the scope of her employment ? As the county court judge said, there was nothing inherently dangerous or obviously reckless in riding back to the farm. Indeed, it was obviously far less dangerous, as MacKinnon, L.J., has pointed out, than the riding in the coal truck in *Seviour* v. *Somerset Collieries, Ltd.* (1). The county court judge based his decision mainly, I think, on the fact that the girl enjoyed riding, which was the motive with which she rode the horse. However, motive is immaterial, as Lord Wright said in *Noble* v. *Southern Ry. Co.* (2). Dealing with the argument which was put in that case with regard to the motive of the railway employee who was walking along the line, he said, at p. 599 ([1940] 2 All E.R., at p. 392) :

> His motive . . . in choosing to go by the prohibited route is immaterial, whether it was to save time or to save himself trouble. The test is objective and depends on the fact that his proceeding to the station was within the sphere of his employment.

Here the girl's duty was to get back to the farm. The proceeding to the farm was within the sphere of her employment. The fact that she was riding on a horse seems to me to be wholly immaterial from that point of view. I agree that the appeal must be allowed and the case remitted to the county court judge to fix the amount of compensation.

DU PARCQ, L.J.: I agree. I wish to say, although it has been said often enough, that these cases clearly depend in the main on the facts A of each particular case, and I fully accept that, as counsel for the respondents said, it is not for this court to interfere with the findings of fact of the county court judge. I come to the conclusion that this appeal should be allowed, because I accept the findings of fact of the county B court judge. Putting them quite shortly, they are these. First of all, this girl was using the horse as a means of getting back to the farm with the can which had contained the farmer's tea, as it was her duty to do. Secondly, the means which she adopted was not an obviously reckless or dangerous way of returning to the farm. Those are the C judge's own words, and, later, he refers to the absence of obvious or apparent risk and says:

> If this case depended upon the question of risk taken, I should have no difficulty in finding in the applicant's favour.

Thirdly, the method adopted was not a prohibited method. Fourthly, the judge finds that she chose the method mainly because she liked it. It D was a joy to her to ride. Fifthly, the accident occurred because a young man ran after the horse and the horse reared and bolted. Those are the five most important findings of fact. In my view, the only possible conclusion from them is that the accident arose out of and in the course of the employment. I said that they were important findings. I do E not wish to say that they are all material findings, because I agree that the fourth finding—namely, that the girl chose the means of return mainly because she liked riding, and because it was a joy to her to ride on a horse—is really immaterial. With great respect to the county court judge, it is easy to see that that is the point at which he goes wrong F in his judgment. He treats the question of motive as if it were conclusive, whereas, as has already been said, it is not really material. He puts the question to himself first: "Was the applicant in fact engaged in performing her duty to her master when she met with her accident?" I should have thought, stopping there, on his findings G the answer was that she was. She was using the horse as a means of getting back to the farm, as it was her duty to do. He has further found that she was using a means which was not, on the face of it, dangerous, or, I think one may say, improper. However, then he goes on to put the question in this way:

> H It is true that she had to take the tea-can home and that she had it with her on the horse, but is this enough? Was she rightly or wrongly riding the horse in order to take the tea-can home, or was she riding the horse for some personal reason, "some frolic of her own"?

I understand from that that, if the county court judge had thought that she was rightly riding the horse in order to take the tea-can home, he would have decided in her favour, and, if he had thought that she was wrongly riding the horse in order to take the tea-can home, he would

have decided in her favour, and by that I suppose he means that, even if he had thought that it was not a very regular or proper way, or even a negligent way, of getting the tea-can home, he would still have decided in her favour if that had been the object of her journey. I have no doubt, applying the objective test (which it seems to me clearly, apart from A
authority, must be applied), that she was riding the horse in order to take the tea-can home. He goes on, as if this were the really conclusive question :

> . . . or was she riding the horse for some personal reason, "some frolic of her own"?

That does clearly raise the question whether a judge is entitled to say : B
"Here is an act which, judged objectively, is for the benefit of the employer, and is part of the work of the workman, and is not being done either contrary to orders or with any apparent increase in the risks of the employment. Nevertheless, if the workman is doing it because he prefers the method for his own enjoyment, it is taken out of the scope of his C
employment, whereas, if he does it without thinking of his own enjoyment, it is within the scope of his employment." That is, fortunately, a wrong view of the law. I say fortunately, because, if it were necessary for the judge to go into these difficult psychological questions, his task would be a great deal more difficult than it is now. I entirely accept, D
as I say, the findings of the county court judge, and, on those findings, I think that we are bound to come to the conclusion to which MACKINNON and LUXMOORE, L.JJ., have come.

With regard to a great many of the passages which have been read from various cases, and in particular the words of LORD ATKINSON in E
Barnes v. *Nunnery Colliery Co., Ltd.* (3), upon which the county court judge very much relies, I venture to repeat what was said by LORD WRIGHT in *Harris* v. *Associated Portland Cement Manufacturers, Ltd.* (4), referring to *Plumb* v. *Cobden Flour Mills Co., Ltd.* (5). LORD WRIGHT said at p. 89 ([1938] 4 All E.R., at p. 842) : F

> In particular LORD DUNEDIN there pointed out that most of the erroneous arguments put before the courts in this branch of the law will be found to depend on disregarding the salutary rule that a test convenient in a particular case must not be allowed to dislodge the original words of the Act. I venture to add that the tendency to disregard the words of the Act and substitute extracts from judgments is largely responsible for the accretion of thousands of cases round a legislative measure which was intended to be administered rather than litigated upon. G

If one looks at the findings of the county court judge here and the words of the Act, it seems to me only one conclusion is possible. I agree that the appeal should be allowed.

Appeal allowed with such costs as are appropriate to an appeal under the Poor Persons Rules. H

Solicitors : *Corbin, Greener & Cook*, agents for *J. E. Brown-Humes & Co.*, Bishop Auckland (for the appellant) ; *Hyman Isaacs, Lewis & Mills*, agents for *Patrick Bennett, Maddison & Wainwright*, Newcastle-upon-Tyne (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law*.]

WATSON *v.* SMITH AND OTHERS.

[CHANCERY DIVISION (Bennett, J.), **May 13, 1941.**]

Trade and Trade Unions—Registered trade union—Rules—Construction—Election of executive council.

The plaintiff claimed an injunction to prevent the defendants, the secretary and members of a trade union executive council, from holding an election of the electoral division No. 7 for the executive council without allowing his nomination to go forward. The defendants contended that the plaintiff had not complied with r. 15, cl. 1 (5) of the union rules, which required that he should have worked at the industry or signed a vacant book and resided for the 12 months immediately preceding nomination. The plaintiff had in fact been absent on sick leave for approximately 8 months during the 12 months immediately preceding the nomination:—

HELD: on the true construction of the rule, the plaintiff had complied with the conditions thereof, as he had resided in the division for the 12 months immediately preceding his nomination, and had worked there during that time.

[**EDITORIAL NOTE.** The question here is purely one of the proper construction of the rule. A literal construction of the rule would seem to lead to an absurdity, since a member would be disqualified for election if he was away for any reason for one day during the year in question. For this reason, the court has decided that the time specified in the rule only relates to the residence.

AS TO RULES OF TRADE UNIONS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 492-497, para. 786-790; and FOR CASES, see DIGEST, Vol. 43, p. 101, Nos. 1048-1052.]

APPLICATION for an injunction that an election to an executive council of a trade union should not go forward without the plaintiff's nomination being allowed. The facts are fully set out in the judgment.

The plaintiff appeared in person.

C. A. J. Bonner for the defendants.

BENNETT, J.: This action raises a very short point upon the construction of the rules of the Amalgamated Engineering Union. The plaintiff, who has conducted his case in person, tells me that he has been in the engineering industry for 45 years. On May 24, 1902, he became a member of the Amalgamated Society of Engineers, a society frequently known by its initials as the A.S.E. In July, 1920, the plaintiff then being a member of the A.S.E., that trade union was merged in the Amalgamated Engineering Union, and the plaintiff then became a member of the Amalgamated Engineering Union, and has continued to be a member of that union down to the present time. The defendants are the president, the general secretary, the assistant general secretary, and six members of the executive council of the Amalgamated Engineering Union, called executive councilmen in the rule. For the purpose of electing executive councilmen, England, Scotland, Wales and Ireland are divided into 7 electoral divisions. One electoral division is at the moment without a representative, because the plaintiff in May, 1940, on a motion for an injunction, obtained from the defendants an undertaking which precluded them from proceeding with the election then on foot of a representative for electoral division No. 7, for which the plaintiff claims he was entitled to stand as a candidate.

The action was brought because the defendants, as the executive A council of the union, refused to allow the plaintiff's candidature to go forward. They refused to allow his name to be put upon the roll of candidates for the office of executive councilman for No. 7 Division, and refused to distribute, as I understand it, his election address. District No. 7 was the district comprising, roughly speaking, London B and the home counties. The plaintiff says that he was properly qualified and properly nominated, and that the defendants were acting illegally in refusing to allow his name to be included amongst the names of those who were standing as candidates.

The relevant rule is r. 15, and the clauses which are relevant and C material, and the only two which have been referred to, are cll. 1 and 4. Clause 1 provides as follows :

> (1) The general executive government of the union shall be vested in an executive council, elected and having such powers and duties as are hereinafter specified. (2) The executive council shall normally conduct its business and hold its sessions in London at 110, Peckham Road, S.E. (3) The executive council shall consist of the D president of the union, who shall be chairman of the executive council, and 7 members to be elected and hold office as follows . . . (4) For the election of such 7 members the rules revision meeting shall divide the area over which the union has jurisdiction into 7 executive council electoral divisions (herein called divisions). (5) Candidates for the office of executive councilman (unless seeking re-election) shall be nominated by and from the division in which he has worked at the industry, or signed a vacant book and resided for the 12 months immediately preceding nomination. (6) Each candidate shall be voted for and elected by the majority of the members of the union E voting, who are members of a branch in the division for which he is nominated, and shall be elected to represent that division.

Those are all the material parts of r. 15, cl. 1. Rule 15, cl. 4, provides as follows :

> Candidates for the executive council must have been adult members for 7 years, F and must not be 8 weeks' contributions in arrears. They shall be nominated not less than 12 weeks before an election, and shall take office 4 weeks after being elected. Nomination and election shall take place on general meeting nights summoned for the purpose. The addresses, and any testimonials which the candidates may desire to submit to the members, shall be issued from the general office in time to allow an interval of at least 5 weeks between the date of receipt by secretaries and the date fixed for the return of votes.”

G

Those are all the material parts of cl. 4.

For some years past the plaintiff has suffered from bronchitis and, as a result, for a considerable period of time was unable to work at his trade. In 1939, however, he was able to work at his trade, and on Sept. 11, 1939, he entered into the employment of Watts & Co., Ltd., a firm carrying on H their business in electoral division No. 7, the division in which the plaintiff resides, and has for some years resided. He continued in the service of Watts & Co., Ltd., until Dec. 31, 1939, when he became ill, and was—at any rate until after Mar., 1940—unable to work at his trade. During the whole time when he was not working at his trade, he was in receipt of sick benefit, paid through the Amalgamated Engineering Union as his approved society, and there is no question but that he was a member of the society.

There was an election for the office of executive councilman, Division No. 7, to take place in Mar., 1940, or about that time. The plaintiff was nominated in accordance with the provisions of r. 15, cl. 4. At that time, he was a member of the Amalgamated Engineering Union, and had been for 7 years. He was not in arrears with his contributions, and his nomination was within 12 weeks of the election. All that is conceded, and he was nominated on Mar. 4, 1940. The defendants refused to allow his nomination to go forward, contending that he was disqualified under r. 15, cl. 1 (5), in that he had not worked in the industry for the 12 months immediately preceding the nomination—that is to say, the 12 months immediately preceding Mar. 4, 1940.

The whole question is whether, upon the true construction of the rule, and because the defendant, by reason of his illness from Mar. 4, 1939, to Sept. 11, 1939, and from Jan. 1, 1940, to Mar. 3, 1940, was disqualified under the provisions of the rule. The question turns entirely upon whether the references in the rules to the period of 12 months apply not only to the residence, but also to the working, of the candidate. In order that he may be qualified, must he have worked continuously in the division in which he seeks to be elected as executive councilman, and have worked continuously for a period of 12 months immediately preceding his nomination ? I do not know that one ought to consider consequences in interpreting a rule or any other instrument, but it is a little difficult to refrain from considering them in a case like this. Upon a strict interpretation of the rule, if the plaintiff suffered from a temporary illness of a week in the 12 months immediately preceding his nomination, he would be ineligible for election, and, if he suffered an accident which kept him away for some part of the preceding 12 months, he would be ineligible for election.

The defendants support their case by reference to the signing of a "vacant book." The vacant book is a kind of unemployment register into which the names of members of the Amalgamated Engineering Union who are out of work and able to work are inserted, so that persons who want to employ members of the union can find out which of its members are able and willing to work, and the defendants say that the reference to working in the industry or signing the vacant book indicates that the period of 12 months applies not only to residence, but also to working and to having employment. I do not agree with that, and I hold that that is not a true construction of the rule. I think that a member of the union who is qualified under cl. 4 and who has resided in the division for 12 months immediately preceding the nomination, is eligible, although he has not worked in the division for the whole of the 12 months immediately preceding the nomination, provided that he has worked in that division. If he has worked in that division and has resided in it for the 12 months immediately preceding the nomination, then, in my judgment, he has the qualifications which entitle him to have his name put upon the roll of candidates. It follows, from the view I have taken of the interpretation of the paragraph, that the action of the defendants was unjustified and violated the terms of the rule, and the plaintiff, therefore, is entitled to the injunction which he claims.

I have had no evidence given by the plaintiff as to damages, and I should not think that the plaintiff has sustained any. I think that the right relief is an injunction to restrain the defendants and each and every one of them from conducting the election to fill the vacancy existing in the office of executive councilman for division No. 7 of the Amalgamated Engineering Union without including the plaintiff as a candidate to that office. There will be nominal damages for 40*s*.

Judgment for the plaintiff with costs.

Solicitors: *Evill & Coleman* (for the defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

CORNELIUS *v.* BANQUE FRANCO-SERBE.

[King's Bench Division (Stable, J.), **June 25, 1941.**]

Bills of Exchange—Illegality—Cheque payable in enemy-occupied country—Presentation for payment dispensed with—Right to sue on cheque—Bills of Exchange Act, 1882 (*c.* 61), *ss.* 45, 46 (2) (*a*), (*c*), 55, 72 (3).

A sum of 2,989.30 Dutch guilders was due by a Yugoslav firm to the plaintiff. To satisfy this debt, the Yugoslav firm arranged for a cheque for the amount due to be drawn in favour of the plaintiff by the defendants, a French bank with offices in Yugoslavia. The cheque was drawn on a bank in Amsterdam and was received by the plaintiff on or about May 10, 1940. By reason of the German invasion of Holland, it was impossible to present the cheque for payment. The plaintiff advised the defendants of his inability to obtain payment, and requested them to authorise their London branch to meet the cheque. The defendants declined to do this, and on Feb. 25, 1941, the plaintiff brought this action against the defendants as drawers of the cheque. On Feb. 28, 1941, the defendants wrote to the bank in Amsterdam instructing them not to pay the cheque. The plaintiff contended that, in the circumstances, presentment of the cheque to the bank in Amsterdam for payment was not necessary in order to make the defendants liable:—

Held: (i) both by English law, under the Bills of Exchange Act, 1882, s. 46 (2) (*a*), and by Dutch law, the plaintiff was relieved from the obligation to present the cheque for payment, since such presentment had been rendered impossible by the German invasion of Holland.

(ii) even if payment of the cheque at Amsterdam had become illegal from the time when Holland became enemy-occupied territory, there was nothing which made it illegal for the plaintiff to sue on the cheque in the English courts or for the defendants to pay the amount due on the cheque to the plaintiff.

[**EDITORIAL NOTE.** The Bills of Exchange Act, 1882, s. 46 (2) (*a*), dispenses with presentment for payment where, after the exercise of reasonable diligence, presentment cannot be effected. It was strongly urged on behalf of the defendants that, after Holland became enemy-occupied territory, it would have been illegal for the plaintiff to present the cheque for payment at Amsterdam, and that, as a result, the defendants, as drawers of the cheque, were relieved from any liability in respect of it. It is held that, notwithstanding that it might have been illegal to present the cheque at Amsterdam, it was in no sense illegal for the plaintiff to sue in England or for the defendants to meet their obligation upon it, as any other result, in the circumstances of this case, would have made the provisions of the Bills of Exchange Act, 1882, s. 46 (2) (*a*) nugatory.

AS TO WHEN PRESENTMENT FOR PAYMENT IS DISPENSED WITH, see HALSBURY, Hailsham Edn., Vol. 2, pp. 688-690, para. 960; and FOR CASES, see DIGEST, Vol. 6, pp. 243-247, Nos. 1560-1583.]

Case referred to:

(1) *Re Francke & Rasch*, [1918] 1 Ch. 470; 6 Digest 243, *1557*; 87 L.J.Ch. 273; 118 L.T. 211.

ACTION on a cheque for a sum of 2,989.30 Dutch guilders drawn by a French bank on a bank at Amsterdam. The facts are fully set out in the judgment.

Gilbert Beyfus, K.C., and *Valentine Holmes* for the plaintiff.
Gerald Gardiner for the defendants.

STABLE, J.: This case raises, as I think, only one point of substance and difficulty. The nature of the claim and the facts may be stated quite shortly as follows. Cornelius, the plaintiff, was engaged in commercial transactions with a concern in Yugoslavia, which I will call Pirot, the last name in their title. He delivered to them some 11½ tons of coconut oil, under the terms of a contract which has no material bearing on this action. The contract price was 2,989.30 Dutch florins or guilders. Pirot, the buyers, in the first instance, remitted sterling to Cornelius—that was before the goods were invoiced—but, owing to the Treasury restriction, Cornelius returned the sterling to Pirot, and on or about May 10, 1940, received a cheque made payable to himself for the sum of 2,989.30 guilders, drawn by the Banque Franco-Serbe, a French bank, on the Amsterdamsche Bank at Amsterdam. The cheque was enclosed in a covering letter to Cornelius from the defendants, in which they say:

> By order and for the account of the Fabrika Guma "Tiger" D. Mladenovic-Gaga & Co. Pirot, we have the honour to send you herewith a cheque No. C023646 on Amsterdam for 2,989.30 Dutch guilders to your order, and we beg you kindly to acknowledge receipt.

It appears from the correspondence that there was some communication from the defendant bank to the bank in Amsterdam. That appears from a letter of May 7, in which the Amsterdamsche Bank, writing to the defendant bank, acknowledge receipt of a communication of May 3, which I have not seen for obvious reasons, in which they say:

> We beg to acknowledge the receipt of your favour of 3 crt. from which we noted draft on us, as per specification below . . .

Then it sets out the amount of the draft and the number, which quite clearly links it up with the cheque I am considering, and then it continues as follows:

> . . . to your debit value to-day. Yours faithfully, Amsterdamsche Bank.

Cornelius acknowledged the cheque on May 10 in a letter to the defendant bank in which he said that he placed the amount to the credit of the account of Pirot, as one would naturally expect, and on the same day he handed the cheque to a merchant bank, the New Trading Co., Ltd., with certain written instructions contained in a letter of May 10:

> I shall be glad if you will immediately telegraph to your Amsterdam correspondents requesting them to obtain payment of this cheque from the Amsterdamsche Bank against their guarantee that they will deliver the cheque in due course. Alternatively, I could give a guarantee to lodge the cheque with the London correspondents of the Amsterdamsche Bank if there are no communications with Holland. I shall be pleased to hear what you have arranged in the matter and thank you in anticipation of your kind assistance. I might mention that this cheque is a payment received from Messrs. D. Mladenovic-Gaga & Co., Pirot, representing the balance due under this credit.

I have no doubt that Cornelius wrote that letter because it came to his ears, or because it was generally supposed, that the German armies were in process of invading the Netherlands and Belgium. I am quite satisfied that, in handing over the cheque to the New Trading Co., Ltd., with the instructions contained in that letter, Cornelius was doing everything in his power to facilitate collection of the proceeds of the cheque, and I am equally satisfied beyond any conceivable doubt that it was a matter of physical impossibility for Cornelius or the New Trading Co., Ltd., or anybody else as from May 10, when the cheque arrived in London, to present that cheque for payment to the Amsterdamsche Bank in Amsterdam. Thereafter, as one might suppose, Cornelius communicated with the defendant bank in Belgrade, and he told them that he was unable to obtain payment of the cheque on account of the invasion of Holland. He told them he still had the cheque, and he asked them to authorise their London branch to meet the cheque. The defendant bank in Belgrade declined to direct their London bank to make payment on the cheque, and in due course this action was brought. I ought to add, perhaps, that on Feb. 28 the defendant bank in Belgrade wrote to the Amsterdamsche Bank in Amsterdam as follows:

> We beg you to note that we have just cancelled the cheque in question, and we should be obliged if you would kindly credit our account again with the amount in question and advise us accordingly.

There is no evidence before me, in the strict sense, as to what the relationship between the defendant bank and the Amsterdamsche Bank was. There is no evidence, in the strict sense, as to whether the defendant bank was accustomed to draw on the Amsterdam Bank against a credit, or whether the practice was to remit the funds to the Amsterdamsche Bank to cover any drafts which might be coming forward, or what the arrangement was, but there is certainly an indication in the correspondence, and, in view of the difficulties of obtaining evidence and making communication in these days, I shall accept that indication as certainly indicating in this particular case that the defendant bank in some form or other had remitted funds to Amsterdam to cover this particular draft. It does not matter very much what the actual machinery was.

Counsel for the plaintiff suing on the cheque has pointed out that, under the Bills of Exchange Act, 1882, s. 45, no action can be brought on a cheque unless it is duly presented for payment, but that is subject to the provisions of the Act of Parliament whereby presentation for payment is dispensed with. It is common ground that this cheque never was presented.

Perhaps, before I proceed to the law, there is one small matter of fact of which I ought to dispose. Counsel for the defendant company with its office in Belgrade, the London branch knowing little or nothing about the transactions, has quite properly taken the line that it is not for him to make admissions. He has taken the point that there is no evidence that the German Army invaded Holland on May 10, 1940. To dispose of that, in my view, first of all, that fact is not put in issue by the pleadings. The pleadings consist of a specially-indorsed writ and an affidavit. It is not open to counsel for the defendants to raise facts to build up his defence without leave, unless those facts are outlined in the affidavit, and the affidavit which Sampson, the manager of the defendants' London branch, has sworn, does not traverse the allegation that the German forces occupied the Netherlands. Even if that is wrong, in my view, I am entitled to take judicial notice, not of the exact hour at which German troops crossed the frontier of the Netherlands, but, at all events, of the fact that during business hours on May 10, 1940, the invasion of Holland by the German Army was in full swing. Everybody knows that.

I have already referred to the Bills of Exchange Act, 1882, s. 45, and that brings me to sect. 46 (2), which provides as follows:

> Presentment for payment is dispensed with, (*a*) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected . . . (*c*) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

The writ was issued on Feb. 25, 1941. On Feb. 28, as I have said, the letter was written containing the instruction by the defendant bank to the bank in Amsterdam not to pay the cheque. That those instructions were given is, indeed, a fact, a copy of the letter in which the instructions were set out being posted on the same day to Cornelius. On May 21, 1940, as appears from a notice in the LONDON GAZETTE, Amsterdam became for all practical purposes, so far as this case is concerned, enemy-occupied territory, or territory in the occupation of the enemy, and, as from that date, under the law of England, it became illegal for the plaintiff to collect the proceeds of this cheque in Amsterdam, even if it had been physically possible to do so, which, in my judgment, it is quite clearly established that it was not. The result is that, as from the time when the cheque got into the plaintiff's possession, it has been throughout impossible for him to present the cheque in Amsterdam for payment at all, and from and after May 21, 1940, it became illegal for him to do so, even if it had been possible. In my view, the effect of what was going on in Germany made it quite impossible to present the cheque, with the result that, if English law applies, presentment for payment as a condition precedent to the liability of the drawer was dispensed with under the provisions of sect. 46 (2), which I have already read. However, one of the questions in this case is whether it is English law which applies or whether it is the law of the Netherlands. That matter is dealt with by the Bills of Exchange Act, 1882, s. 72 (3), which provides as follows :

> The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

If it is necessary for me to decide whether the law of England or the law of Holland prevails, in my judgment, it is the law of England. I think that that view is certainly fortified by a passage in *Re Francke & Rasch* (1) at p. 479. Apart from that decision, in my view, that is the proper conclusion at which to arrive. This action is being brought in an English court, and I think that for this purpose sect. 72 (3) means no more than that, where acts and formalities are required, and where those acts and formailties are requirements of a foreign law, one must of necessity understand what the foreign law requires or one will not understand anything. Where, however the English law says that no acts or formalities are required in these circumstances in any foreign country, it seems to me idle to inquire what the acts or formalities would be in a foreign country if performance of those acts or formalities had not been excused by the law of England. However, the point is purely academic, because I am quite satisfied by the evidence of Dr. Kropveld, an eminent Netherlands lawyer, that there is no distinction, so far as anything material to this case is concerned, or no substantial distinction, between the law of the Netherlands and that of England. Each alike says, in effect, that, when presentation is rendered impossible, the necessity for that particular formality is excused, and, in my judgment, whichever is the appropriate code, the English or the Dutch, the result in this respect is exactly the same.

Counsel for the defendants raised other points. He urged that there was no consideration for this particular cheque. I am bound to say that that part of his argument I failed entirely to understand. It seems to me that there was ample consideration for the cheque. The plaintiff was receiving the cheque on the terms of the letter with which it was sent as payment—whether conditional or absolute payment I do not know—for goods which he was shipping to Europe. However, counsel for the defendants took one point which I am bound to say has caused me a very considerable amount of doubt. He says, and says rightly: "My obligation to the plaintiff is an obligation on the cheque. Outside the cheque, there is no contractual relationship between us at all. There is no alternative claim for the price of goods sold and delivered, or anything of that kind." That, of course, is right. He says that as from May 21, 1940, the law of England made it illegal for the plaintiff to present a cheque at Amsterdam and to receive payment of the proceeds there, and, therefore, no action will lie against him on the cheque. At the place appointed, there were funds, and, because it has become illegal for the plaintiff to present the cheque (albeit it has become impossible, even if it was not illegal), that illegality precludes a successful action being brought on the cheque. The position of a drawer is set out in the Bills of Exchange Act, 1882, s. 55, as follows:

> The drawer of a bill by drawing it engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken.

Counsel for the defendants says that although sect. 45, in certain circumstances, dispenses with the necessity of presentation, that cannot impose on the defendant an obligation to pay an exactly appropriate amount arising out of a contract when the performance of that contract has been rendered illegal. I confess that it is an attractive argument. Counsel for the plaintiff says, first of all, that it is not an attractive argument, and secondly, that the point is concluded by authority. If I may deal with the question of authority first, the only authority which really throws any light on this point is *Re Francke & Rasch* (1). I can only say that I wish that this case were concluded by that authority, because it would save an endless amount of trouble if it were. The real answer is that in that case the point was never taken. It may be that it was not taken because there the negotiable instruments which were the subject-matter of the claim were bills of exchange which had been drawn and accepted by various customers in Europe and which had been discounted by the drawers with their bankers in London. The drawers' firm, which was an enemy business, in circumstances which arose out of the Great War, was being wound up under the provisions of the Trading with the Enemy (Amendment) Act, 1916, and the bank sought to prove in that winding up for the face values of the bills. The actual effect of the decision was that, whereas these bills were accepted payable at certain places in enemy territory, the obligation of the acceptor, of course, being an obligation only to pay at the time specified and at the places specified, the German Government having extended the maturity dates of the various bills—I said the German Government, but I think that in some cases it was actually the Austrian Government, but it does not make any difference—there was no immediate liability on the acceptor at all, because the drawers' obligation was only a secondary obligation to pay if and when the acceptor should pay but did not, and, on those grounds, the claim in the winding up was rejected. The point was never taken that it had become illegal for the acceptor to pay, and it may be that the reason why that point was never taken was that, if it had been established that it was illegal to collect the money from the acceptor and illegal for the acceptor to pay the money, what had been the primary obligation would have gone, and the immediate and primary obligation would then have been thrown on to the drawers. That may be one of the reasons why the point was never taken. In point of fact, it never was taken, and, in my view, the observations of YOUNGER, J., at p. 479, do not really decide the point one way or the other.

I have to decide the point unaided by authority. It is important to remember that there is nothing which makes it illegal for the plaintiff to receive the sum of money claimed from the defendants, and nothing which makes it illegal for the defendants to pay that sum of money to the plaintiffs. The only illegality which supervened as from May 21, 1940, was in relation to the machinery by which that payment could be effected. There is nothing, as I have said, which makes it illegal or undesirable or improper in any way for the defendant bank to pay the money. What was made illegal was collecting the money in the particular way indicated on the face of the cheque. In my view, when the Act of Parliament says that the presentation for payment is dispensed with, it means that presentation for payment is dispensed with, and that all the machinery and formalities which presentation involves are, as it were, expunged, and the holder is at liberty, if he can, to obtain, or, if he cannot obtain, to sue and recover, the money from the drawer. In my judgment, where the only thing which has become illegal is the presentation of the cheque at the place indicated, to hold that failure to present for payment precludes the holder from suing on the cheque is to defeat the whole object of the Act of Parliament. For example, one might take a case in which a cheque was drawn on a particular branch of a particular bank in a particular street of a particular town in England, and, owing to the exigencies of the war, that particular street might become a very special area, and the public, by Act of Parliament or regulation, might be precluded from going to that place at all, or from transacting business there. If the result of that was that everybody who had a cheque payable at that particular branch of the bank, which happened to be out of bounds, was to be deprived of his right to sue on the cheque, it seems to me that the result would be that the whole object of the section which dispenses with presentation would be rendered completely nugatory. In the result, I think that the plaintiff succeeds, and is entitled to judgment for the sterling equivalent, with interest at the statutory rate of 5 per cent. from May 29 to date.

Solicitors: *Godfrey Warr & Co.* (for the plaintiff); *Bischoff & Co.* (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* KITCHIN AND OTHERS.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **July 2, 1941.**]

Estate Duty—Property passing on death—Irrevocable voluntary settlement—Family arrangement—Finance Act, 1894 (*c.* 30), *ss.* 1, 3 (1), (2).

On Nov. 18, 1921, B. made an irrevocable voluntary settlement of shares in an American company in favour, *inter alia*, of certain of his sisters and nephews. On Aug. 28, 1922, the trustee sold the trust property to an English company in return for shares and debentures therein. B. then recollected that he was under a liability to his deceased brother's estate, and was also dissatisfied with the settlement on the ground that it was irrevocable. Counsel advised him that, since he had forgotten this liability and had been under the impression that he could vary the settlement, it was possible that he might be entitled to have it set aside. After lengthy negotiations, B.'s sisters and nephews entered into a family arrangement on Nov. 11, 1922, whereby, *inter alia*, a life interest in the property the subject of the settlement was reserved to B., who was also granted the right to raise from the trust fund a sum sufficient to meet his liability of $300,000 to his deceased brother's estate, the amount of the annuities payable to his sisters and nephews also being altered. So far as was consistent therewith from and after B.'s death, the trustee was to hold the capital and future income of the trust funds upon the trusts declared in the voluntary settlement. On Dec. 16, 1922, stamp duty was charged on the family arrangement as on a conveyance on sale. B. died on Aug. 21, 1939, having waived his right to raise the $300,000. The Crown claimed estate duty on the property comprised in the settlement and family arrangement as property passing on the death of the deceased under the Finance Act, 1894, s. 1. The Crown conceded that, as stamp duty had been paid on the $300,000 and on the annuities, the case should be treated as a purchase for partial consideration under sect. 3 (2):—

HELD: (i) apart from the continuing liability in respect of two of the annuities, the fund created by the deed of family arrangement was property which passed on B.'s death within the meaning of sect. 1.

(ii) the property passing on B.'s death was the subject of a *bona fide* purchase for full consideration, and was, therefore, exempt from liability to estate duty, by virtue of sect. 3 (1).

[**EDITORIAL NOTE.** *Lethbridge* v. *A.-G.*, [1907] A.C. 19; 21 Digest 18, *99*, established that a family arrangement may also be a bargain and sale. As LORD ATKINSON pointed out in that case, it is the substance of the transaction which is to be looked to rather than the form of conveyance which may have been adopted. In the present case the consideration for the family arrangement was, in effect, that, in return for the benefits which he derived under the family arrangement, the settlor should refrain from exercising his hypothetical right to have the voluntary settlement set aside and should also covenant to pay certain annuities.

AS TO EXCEPTIONS FROM CHARGE OF DUTY WHERE CONSIDERATION GIVEN, see HALSBURY, Hailsham Edn., Vol. 13, pp. 251, 252, paras. 244, 245; and FOR CASES, see DIGEST, Vol. 21, pp. 17-19, Nos. 97-110.]

APPEAL by the informant from an order of LAWRENCE, J., dated May 9, 1941, and reported [1941] 2 All E.R. 374, where the facts are fully set out.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *J. H. Stamp* for the appellant.

J. Norman Daynes, K.C., and *P. B. Showan* for the respondents.

Stamp: The question is whether the property passed on William Henry Benn's death in consideration of a *bona fide* right to challenge the first settlement. Giving up the claim is no consideration at all. The second deed was really a recognition in part of his antecedent claims. The judge was wrong in holding (i) that, because it was a business transaction, it was a conveyance on sale for full consideration, and (ii) that the exchange of rights made it a transfer for full consideration. He ignored the pre-existing claims.

Counsel for the respondents was not called upon.

Scott, L.J.: I will ask Clauson, L.J., to give the leading judgment.

Clauson, L.J.: This is an appeal from a decision of Lawrence, J., by which he dismissed with costs an information by the Crown claiming estate duty in circumstances detailed in his judgment. It might have been sufficient to say that, so far as I personally am concerned, I can see no flaw in his judgment, and that I agree with it, but, in deference to the very interesting argument placed before us by counsel for the appellant, I should like to have an opportunity of explaining in my own words, because the matter is a little intricate, the exact grounds upon which, as I conceive it, the court was bound to dismiss the information.

All the relevant facts are really contained in a document, dated Nov. 11, 1922, which has been referred to as the second settlement, and I think I can best state the facts by referring to the recitals in that document, from which the whole point of the difficulties which have arisen will become plain. It is a document which has been described as a deed of family arrangement made on Nov. 11, 1922, between three ladies and two gentlemen, whom I will call the relatives, for convenience, and William Henry Benn, the settlor, and Jonathan Knowles, who was trustee of a settlement about a year earlier in date than the document which I am reading. The first recital commences as follows:

> Whereas by an indenture of voluntary settlement (hereinafter called the settlement) dated Nov. 18, 1921, and made between the said William Henry Benn of the one part and the said Jonathan Knowles of the other part . . .

After reciting that the settlor had transferred into the name of Jonathan Knowles some shares in an American company and that prior to the date of such transfer it had been mutually agreed that those securities should be held upon the trusts hereinafter declared, it was agreed and declared that Jonathan Knowles or other the trustees or trustee of the settlement (therein and hereinafter called the trustee or trustees) should stand possessed of the shares (therein and hereinafter called the said trust fund) and the income thereof upon trust to pay an annuity of £5,000 (free of income tax) to Miss Benn, the sister of William Henry Benn, during her life, and an annuity of £200 (free of income tax) to Knowles so long as he should continue to act as a trustee of the settlement, and, subject thereto, upon certain trusts which it is unnecessary to go through at length. The trusts are those under which the older relatives obtained certain life interests, and ultimately the fund finds its way to the younger relatives. I need not spend time upon the details of the trusts. Then there is a recital of an agreement called the pooling agreement, which had been made between one Harrison Benn, who was the brother of William Henry Benn, and William Henry Benn. After a recital that the two brothers were holders of the whole of the share capital in this American company, it was thereby agreed that the net profits of the company should be pooled for a certain period and divided in certain proportions between the two brothers. Then there is a recital that Harrison Benn died in 1921 and that:

> . . . under the provisions of the pooling agreement there is due to his estate from the settlor [William Henry Benn] a sum which has not yet been finally ascertained, but which is estimated will not exceed $300,000 together with interest thereon.

We are told that the $300,000 might be treated as roughly £60,000. Then there is the recital:

> And whereas the trust fund is now represented by the investments mentioned in the schedule hereto [various shares and debentures of the company] And whereas the settlor [William Henry Benn] states that he declared the said trusts of the settlement (1) in forgetfulness of the existence of the pooling agreement and of his liabilities thereunder and (2) in the belief that he would have power to vary as he should think fit the trusts contained in the settlement And whereas the settlor has requested [the relatives] to agree that the settlement should be varied as hereinafter appears [the adult relatives have agreed that the settlement shall be so varied] And whereas the name of Harry Eustace Marsland Benn [the fifth relative, an infant] has been inserted as a party to these presents to the intent that he may if he shall think fit execute the same on attaining his majority but the effect of the execution of these presents by the adult parties hereto or any of them as binding each such respective party shall not in any way be prejudiced by the non-execution of these presents by the said Harry Eustace Marsland Benn or by any other person herein named as a party to these presents NOW THIS INDENTURE WITNESSETH that it is hereby agreed and declared as follows . . .

The position as shown by these recitals is that, under the earlier settlement, these American securities had become the property of the relatives subject to the payment of the annuities to the sister and to the trustee, that William Henry Benn was minded to have that settlement varied, and that there were in existence circumstances which he evidently thought made it reasonable for him to claim that the settlement should be varied, and the relatives had acceded to that suggestion and were prepared to agree—they being absolute owners of the property, subject to the annuities I have mentioned—that the thing which was their property should remain their property, but only subject to certain variations.

We now come to the operative part of the deed:

> 1. In lieu of the trusts declared by the settlement the trustee or trustees shall hold the said trust funds and the income thereof upon the trusts following that is to say: (*a*) Upon trust by sale mortgage or other means to raise out of the capital of the said trust funds such a sum (not exceeding in the whole the sum of $300,000) as shall be necessary to meet the outstanding obligations of the settlor to the estate of the said Harrison Benn under the pooling agreement and to pay such sum to the legal personal representatives of the said Harrison Benn in discharge of the said debt. (*b*) Subject as aforesaid the trustee or trustees shall hold the said trust funds and the income thereof upon trust to pay the said income [to William Henry Benn

during his life]. (c) Subject to the preceding provisions of this clause the trustee or trustees from and after the death of the settlor shall hold the capital and future income of the said trust funds upon the trusts declared in the principal indenture so far as the same shall then be subsisting and capable of taking effect except that . . .

Then there is a modification in the words in which the original annuities to the sister and to the trustee were referred to, which was obviously A put in for certain income tax reasons to which it is not necessary to refer here. Then the deed continues as follows:

> Provided always that the said Harry Eustace Marsland Benn shall not take any interest in the said trust fund or have any power of appointment over any part thereof unless and until he being of full age shall have executed these presents. B

Then comes a covenant by William Henry Benn that, during the joint lives of himself and the various relatives, he will pay the relatives certain annuities, and that again provides that, if the infant does not come in, he is not to have the benefit of that covenant. Then there is a similar covenant that during his life he will pay Knowles a similar annuity. C Then there is a clause providing what is to happen if the infant does not come in.

What is the result of that document? It seems to me quite plain that the relatives owning the fund—I disregard the overriding annuities to the sister and to the trustee, which do not affect the point at all— D have been requested by William Henry Benn to give him certain benefits out of the fund, benefits consisting of a sum of approximately £60,000 of capital which he was to be entitled to draw in order to make good his obligations, and the income of the fund during his life. That is what he was asking for and what they were willing to give him. What did E they ask for as consideration for giving him that? They asked for, and William Henry Benn was willing to give, two things—namely, (i) a covenant to pay certain annuities during the joint lives of himself and the annuitants, and (ii) an undertaking to give up any right he might claim to set aside the original settlement. I agree that this F undertaking is not expressly stated, but it is obviously implied and the scheme will not work without it. When A wants to induce B to give him something, and B says that he is willing to give that thing to A if A will give him a *quid pro quo*, that is only an unnecessarily complicated way of saying that A is prepared to sell the thing in question G to B for a consideration upon which they agree, and that seems to be exactly the result of this deed. Can that reasonably be spoken of as a sale? I should have thought that it would be unreasonable to speak of it as anything else. It is quite plainly a sale by the relatives of certain benefits to William Henry Benn for the double consideration H which I have mentioned. He agreed to pay the annuities and not to seek to enforce a right he conceived himself to have, or may have conceived himself to have, to set aside the settlement. In those circumstances, the question of death duties arises in this way. Having regard to the provisions of the deed, which seems to me, I admit, to be an agreement to purchase, when William Henry Benn died, as he did on Aug. 21, 1939, his life interest created by that deed, which I regard as a purchase deed, came to an end. It is agreed that, in those circumstances, the fund—again I disregard the overriding annuities—passed on his death. Nobody doubts that. It is quite A plain that it passes upon his death within the meaning of the words in the Finance Act, 1894. There is an exception, however, which is to be found in sect. 3, which provides as follows:

> (1) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity B for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit . . .

That is modified by subsect. (2), which provides as follows:

> Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth . . . the value of the consideration C shall be allowed as a deduction from the value of the property for the purpose of estate duty.

The first question is under whose disposition the property passed on the death of William Henry Benn. I should have thought that there was no reasonable doubt that it passed under the disposition effected by the D deed of Nov. 11, 1922, which I have read, because that deed created the life interest on the termination of which the property passed, and accordingly I should have said that it was clear that the persons under whose disposition the property passed were the body of persons I have spoken of as the relatives. Did the property so pass by reason only of E the *bona fide* purchase by those persons? It seems to me that it passed by reason only of that purchase having had effect. This had the result of the life interest being created, the termination of which involved the passing of the property. There is no suggestion that the purchase was otherwise than *bona fide*. The next question to consider is as to F whether it passed for full consideration in money or money's worth. What was the consideration? The consideration, as I understand it, was the covenant to pay the annuities, and that, I understand, has been treated as representing £120,000. There was also the consideration of William Henry Benn giving up such rights as he might have, or con- G ceive himself to have, in respect of setting aside the original settlement. How that could be valued I do not know, but it is, of course, capable of valuation somehow or other. I must confess, after having my attention drawn to the opinion of counsel, that I should be surprised to find that any dealer or any insurance office would be prepared to value that H right or claim at anything but a somewhat exiguous figure. However, that is a point which we need not consider. The claim was a genuine claim, though it may have been ill-founded. Its cash value might well be regarded as a very small sum, but the facts show that the relatives, as bargainers, formed the view that it was better for them to secure the abandonment of the claim than to fight William Henry Benn and risk the complete loss of their rights under the original settlement. Their *bona fides* is not questioned. They received what they *bona fide* considered, not unreasonably, to be full value for the concessions they made to William Henry Benn. In my view, as in that of the judge, it is impossible to say that full consideration did not pass. The result of the judgment which I have given, taking precisely the same view of the matter as LAWRENCE, J., took, must be that the appeal is dismissed.

SCOTT, L.J.: I agree.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant): *S. F. Miller, Mathews & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BOSWELL *v.* PARTRIDGE, JONES & JOHN PATON, LTD.

[COURT OF APPEAL (MacKinnon and du Parcq, L.JJ.), **June 30, July 7, 1941.**]

Workmen's Compensation—Claim by dependant—Outdoor relief given to deceased workman—Amount not repaid by employers—Claim to deduct amount owing from sum payable to dependant—" Weekly payments "—Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 8 (2) (iii), 41.

The appellant, the widow of a workman, claimed £300 compensation under the Workmen's Compensation Act, 1925, as a dependant in respect of her husband's death. At the date of the arbitration, (i) no payments by way of compensation had been made by the respondents to the workman during his life (except possibly payments amounting in all to less than £10) or to his personal representatives after his death, (ii) during the lifetime of the workman and " pending the settlement of the claim to compensation," payments amounting to £92 9*s.* 6*d.* had been made by the county council by way of outdoor relief, which relief would not have been granted had the workman then received, or been in receipt of, compensation, and (iii) the county council had claimed the repayment of £92 9*s.* 6*d.* from the respondents under the Workmen's Compensation Act, 1925, s. 41, but the respondents had not paid that sum or any part thereof :—

HELD : as the employers had neither paid compensation to a workman during his lifetime nor repaid to the local authority money granted by it as outdoor relief, they could not claim to deduct from the amount payable to a dependant any sum which they might be liable to pay in respect of such relief.

[**EDITORIAL NOTE.** This case deals with a point which does not seem to have arisen before. Under sect. 41 of the 1925 Act an employer may be compelled to refund to a local authority relief granted to the workman which would not have been granted had the workman received compensation due to him under the Act. Under this provision the employers in this case became liable to refund to the local authority £92 9*s.* 6*d.* The workman died of an industrial disease, and the employers wished to set off this liability to the local authority against their liability to the dependant. The employers had, however, not paid this sum to the local authority, and it is held that they had no right of set-off unless they had, in fact, paid the amount due to the local authority.

AS TO DEDUCTIONS FROM COMPENSATION, see HALSBURY, Hailsham Edn., Vol. 34, p. 911, para. 1254; and FOR CASES, see DIGEST, Vol. 34, pp. 410, 411, Nos. 3334-3341. See also WILLIS'S WORKMEN'S COMPENSATION, 33rd Edn., pp. 257, 258.]

Cases referred to:

(1) *Board of Education* v. *Rice*, [1911] A.C. 179; 19 Digest 602, *290*; 80 L.J.K.B. 796; 104 L.T. 689.

(2) *R.* v. *Westminster Assessment Committee, Ex p. Grosvenor House (Park Lane), Ltd.*, [1941] 1 K.B. 53; [1940] 4 All E.R. 132; Digest Supp.; 110 L.J.K.B. 6.

(3) *Williams* v. *Vauxhall Colliery Co., Ltd.*, [1907] 2 K.B. 433; 34 Digest 410, *3335*; 76 L.J.K.B. 854; 97 L.T. 559; 9 W.C.C. 120.

(4) *Forster* v. *Llanelly Steel Co. (1907), Ltd.*, [1941] 1 All E.R. 1; Digest Supp.; 110 L.J.K.B. 120; 164 L.T. 372; 33 B.W.C.C. 356.

APPEAL by the applicant from an award of His Honour JUDGE THOMAS sitting at the Newport County Court, dated Apr. 25, 1941. The matter arose out of the death of Charles Boswell, who died from silicosis, an industrial disease within the Workmen's Compensation Act, 1925. Boswell was a bricklayer and was employed in lining furnaces in certain mills. The Court of Appeal, in a case dealing with another workman, held that a bricklayer so engaged was not entitled to compensation. That decision was, however, reversed by the House of Lords: *Forster* v. *Llanelly Steel Co. (1907), Ltd.* (4). Before the Court of Appeal gave its decision, Boswell, who was then alive, commenced arbitration proceedings. When the decision of the Court of Appeal was given, his solicitor withdrew those proceedings. The decision in the House of Lords, however, enabled the solicitor to call upon the respondents to pay compensation. In the meantime, certain advances had been made to Boswell by the Monmouthshire County Council under the National Health Insurance Act, 1936, and certain sums had been advanced to him under the Poor Law Act, 1930, s. 49. Boswell died on Feb. 8, 1941. The respondents' insurance company sent a cheque payable to Boswell himself a few days before his death, but, before the cheque could be cleared, it was stopped, on the ground that a claim had been received from the Monmouthshire County Council in respect of the advances made. The county council's rights to recover advances are derived from the Workmen's Compensation Act, 1925, s. 41. After the death of Boswell, his widow, the present appellant, brought these proceedings under the Workmen's Compensation Act, 1925, as a dependant of the workman, and the employer sought to set off against her claim the amount due to the Monmouthshire County Council. At the time of the appeal this amount had not been paid.

Gilbert Paull, K.C., and *S. R. Edgedale* for the appellant.

W. H. Duckworth for the respondents.

Walter Gumbell for the Monmouthshire County Council.

Paull, K.C.: The widow is entitled to an independent claim for compensation under the provisions of the Workmen's Compensation Act,

1925. No payments were made under sect. 41 of the Act. "Weekly payments" can refer only to weekly payments made under the Workmen's Compensation Act, 1925. Even if the workman had failed in a claim for compensation, the appellant could still bring her claim. It is a statutory claim. She claims as a dependant and not as administratrix. The principle is clearly laid down in *Williams* v. *Vauxhall Colliery Co., Ltd.* (3). [Counsel referred to *Forster* v. *Llanelly Steel Co. (1907), Ltd.* (4).]

Duckworth: The registrar has a right to make inquiries and he is authorised by the rules to do so. The relief given to the workman took the place of the weekly payments. As the respondent company had received notice from the authorities, it was under a duty to repay the sum. The estate of the deceased will presumably be worthless, and thus no claim can be made against it by the authorities in respect of the relief which has been given. In the present case, the workman received relief in lieu of compensation. One wants to give a reasonable construction to Acts of Parliament, and the court should lean against a construction which would require employers to pay twice over.

Gumbell: The only question which arises is whether or not the sum which has been paid can be deducted under the provisions of the Workmen's Compensation Act, 1925, s. 8 (2) (iii). The point is not covered by authority. The scheme of the Act is contained in sect. 41. The scheme can be said to amount to a statutory agency with a statutory right to an indemnity. In the present case, the workman made a claim and relief was paid to him. Therefore, the local authority clearly comes within the words of the section. If the relief stands in lieu of weekly payments, they can be deducted from the sum of £300 payable to the widow in the same way as weekly payments made by the employers can be deducted. The local authority is authorised to give relief by way of loan

Paull, K.C., in reply: If the county council is making a claim for repayment under sect. 41, it is its duty to prove certain facts. In the present case, the workman's disability occurred in May, 1939. The county council, however, commenced to give relief in Dec., 1938. The case really looks to be one in which the county council has given relief under its statutory duty. If no facts were proved in the county court, there was no ground upon which the judge could order that the money was payable. If the council was lending money to the workman, it cannot be said that the money paid constituted weekly payments under the Workmen's Compensation Act, 1925.

MacKinnon, L.J.: In this case I have had the advantage of reading the judgment of du Parcq, L.J. I agree with the order which he proposes for the reasons which he gives.

du Parcq, L.J.: By the order appealed from, the county court judge declared the sum of £200 to be the correct and sufficient sum to be paid into court. This decision can only be supported if it is possible to hold that, at the date of the order, the respondents were entitled to deduct from the sum of £300 a sum of £100 in respect of compensation payable by them to the deceased workman during his lifetime. The respondents A must rely on the Workmen's Compensation Act, 1925, s. 8 (2) (iii), which provides as follows:

> There shall be deducted from the sum as above calculated [which in this case is admittedly £300] the amount of weekly payments (if any) made to the workman before his death so, however, as not to reduce the lump sum below £200 . . .

The position at the date when the order was made may be summarised B as follows. (1) No payments by way of compensation had been made by the respondents to the workman during his life (except possibly payments amounting in all to less than £10) or to his personal representatives after his death. (2) During the lifetime of the deceased workman and "pending the settlement of his claim to compensation," payments C amounting to £92 9*s*. 6*d*. had been made to him by the county council by way of outdoor relief, and it seems clear that this relief, or the greater part of it, would not have been granted had he then "received or been in receipt of compensation." (3) The county council had claimed the repayment of the sum of £92 9*s*. 6*d*. from the respondents under sect. D 41 of the Act, and, subject to any dispute as to quantum, the respondents were compellable to pay that amount to the county council, but they had not in fact paid any part of it. In these circumstances, the respondents desired to obtain a decision that the sum of £200 and no more was due from them to the dependant. A perusal of the Workmen's Compensation E Rules, 1926, r. 61 and a comparison of Form 55 in the Appendix with the *praecipe* issued by the respondents make it plain that they found the machinery provided by the Act ill-adapted to their purpose, and much might be said about the irregularity of the proceedings. In the circumstances of this case, it is not necessary to comment on them in detail. F It is enough to say that, when Parliament has laid down rules and prescribed forms, a party to litigation who deliberately departs from them does so at his own risk.

I will assume (though I need not fully decide) that, as was suggested on behalf of the respondents during the argument, the following proposi- G tions are a correct statement of the law. (1) For the purposes of sect. 8 (2) (iii), an employer who holds the receipt of the local authority for a sum paid under sect. 41 must be taken to have paid compensation during the period covered by the grants of out-relief. (2) It follows that he must be taken to have made weekly payments to the workman before H the death of the workman so as to satisfy sect. 8 (2) (iii). However, assuming these propositions to be correct, as they propably are, they do not assist the respondents' case. I cannot persuade myself that an employer who has neither paid compensation to the workman nor repaid to the local authority money granted by them as out-relief can be said to have made weekly payments to the workman before his death. The respondents cannot improve their position by making a payment now, nor would they have improved it, in my opinion, by giving an undertaking in the county court that they would pay the sum due to the council. The question must be considered with reference to the facts as they were at the date of the order, when the rights of the parties fell to be determined. If the propositions set out above are correct, the cause of the respondents' failure to show that they have made weekly payments is their own omission to carry out their legal obligation to pay the local authority "on demand," and nobody but themselves can be blamed for this delay and its consequences. They seem, in fact, to have mislaid or lost the first letter of demand and to have paid no attention to it. However, this is not a strictly relevant consideration, though it may affect what are sometimes called the merits. The legislature has provided no relief for the employer who has omitted to pay compensation or to do anything equivalent to the payment of compensation. Parliament may advisedly have refrained from so providing, thinking, perhaps, that money due to a workman or a local authority should be promptly paid. I do not feel justified in straining the language of the Act in an attempt to give relief to respondents who have misunderstood its provisions, especially as I am not convinced that the intention of the legislature would be carried out if I did so. In my opinion, the appeal should be allowed, the order of the county court set aside, and (subject to anything which counsel for the respondents may have to say as to the small weekly payments alleged to have been made during the workman's lifetime) it should be declared that £300 is the correct sum to be paid into court. The appellant should have her costs here and below. I think that no order should be made as to the costs of the county council.

Before I part with the case, it may be well to refer to the complaint made on behalf of the appellant that the registrar refused to communicate to her solicitors, for the purposes of this appeal, information which he had received in accordance with r. 61 (3). Without entering into the merits of this case, I think that it is desirable to restate the principles enunciated by Lord Loreburn, L.C,, in *Board of Education* v. *Rice* (1), at p. 182:

> . . . a fair opportunity [should be given] to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

It has been said in this court that these words may be applied to any inquiry of a judicial character: see the judgment of Clauson, L.J., and myself in *R.* v. *Westminster Assessment Committee, Ex p. Grosvenor House* (*Park Lane*), *Ltd.* (2), at p. 68 ([1940] 4 All E.R., at p. 143).

Appeal allowed with costs.

Solicitors: *W. H. Thompson* (for the appellant); *Goldingham, Wallington & Co.* (for the respondents); *Torr & Co.*, agents for *Vernon Lawrence*, Clerk to the Monmouthshire County Council, Newport (for the Monmouthshire County Council).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re BRUNNER'S DECLARATION OF TRUST. COGHILL *v.* PRESIDENT AND COUNCIL OF CHELTENHAM COLLEGE AND ANOTHER.

[CHANCERY DIVISION (Simonds, J.), **May 14, 1941.**]

Charities—Charitable trust—Power to revoke and vary trusts—Exception of one clause—Other clauses with similar provisions—Construction of power to vary—Recourse to capital.

By cl. 3 of a trust deed of a certain school, it was declared that the trustees thereof might acquire property or money, and that they might "apply the income thereof in perpetuity for or towards all or any of the purposes hereinafter mentioned for the benefit of the school." By cl. 5, it was provided that: "No property vested in the trustees shall ever be expended but the income only thereof shall be applied by the trustees for or towards all or any of the purposes mentioned in cl. 3." By cl. 19, power was given to the trustees to revoke or vary any of the provisions of the trust deed other than those of cl. 3. The trustees desired to have the power to employ capital as well as income for the purposes of the school, and they proposed to revoke cl. 5, which was not within the prohibition of cl. 19, and substitute the following clause: "The trustees shall be at liberty to apply the whole or any part of the capital of the property to the general purposes of the trust for or towards any of the objects or purposes stated in cl. 3, as well as the income thereof":—

HELD: the proposed variation was invalid. The fact that cl. 5 could be revoked or varied did not mean that cl. 3, whether it stood alone or in conjunction with cl. 5, could have any meaning other than that which it naturally bore—namely, an obligation to employ the income only of the trust fund for the objects enumerated therein.

[**EDITORIAL NOTE.** This summons raised a short but important point of construction. The trust deed gave a power to vary the provisions of the trust deed except those in clause 3. That clause was mainly concerned with the purposes to which the trust fund might be applied, but contained the following words: "may apply the income thereof in perpetuity for . . ." A later clause contained an express prohibition against recourse to capital, and, as it was permitted to the trustees to vary this later clause, it was suggested that the trusts might be varied to allow the application of capital, although incidentally clause 3, which could not be varied, stated that only the income was to be applied. The court with regret found itself unable to adopt that construction.

AS TO POWERS OF TRUSTEES OF CHARITABLE TRUSTS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 324-327, paras. 538-546; and FOR CASES, see DIGEST, Vol. 8, pp. 376, 377, Nos. 1869-1885].

SUMMONS to determine whether a proposed variation of a trust deed dated Sept. 27, 1917, was valid. The facts are fully set out in the judgment.

A Geoffrey Cross for the plaintiff.

W. F. Waite for the first defendants, the president and council of the college.

H. O. Danckwerts for the second defendant, the Attorney-General.

SIMONDS, J.: This application, which is by the trustees of a declaration of trust, raises the question of the effect of the power of variation contained in that deed. The deed was one executed on Sept. 27, 1917, by certain persons who thereby constituted themselves trustees thereof, and its purposes were to raise funds for the assistance of Cheltenham College, a school founded in 1841 and incorporated by the Cheltenham College Act, 1894. I will add that in 1868 a society of boys educated at Cheltenham College, called the Cheltonian Society, had been established. The trust deed set out certain definitions in cl. 2, and then by cl. 3 provided as follows:

> The trustees may acquire, whether by way of donation, subscription, legacy or otherwise, any property or moneys (not being land of any tenure) and may apply the income thereof in perpetuity for or towards all or any of the purposes hereinafter mentioned for the benefit of the school and the promotion of its interests . . .

Then, under the headings (*a*), (*b*), (*c*), (*d*), come the various purposes for the benefit of the school. I do not think that there is any doubt that, if that clause stood alone, it would not be within the power of the trustees to employ any part of the corpus for any of the enumerated purposes, nor is there any doubt that the word "may" there is permissive only in the sense that it gives the trustees power to choose between the several objects and purposes which are enumerated. Clause 4 is an elaboration of cl. 3. It provides that, where property is vested in the trustees for the general purposes of the trust, or where no trusts are provided, the trustees shall, in their discretion, apply the income of such property for or towards all or any of the purposes mentioned in cl. 3. By cl. 4 (*b*), certain provisions are made in regard to property in respect of which special trusts apply. Then comes cl. 5, which provides as follows:

> No property vested in the trustees shall ever be expended but the income only thereof shall be applied by the trustees for or towards all or any of the purposes mentioned in cl. 3.

After a number of other clauses, which are not material to the present question and to which I need not refer, cl. 19 provides as follows:

> It shall be lawful for the trustees at any time by deed executed by the trustees, or if they shall be more than three in number by any three of the trustees, to revoke or vary any of the provisions herein contained other than the provisions of Cl. 3 hereof, and in lieu thereof to declare and make any new provisions and so that this present power may be exercised from time to time in regard to the provisions (excepting as aforesaid) which by virtue of these presents and any deed or deeds to be executed in pursuance of this present power shall for the time being be applicable to the trust and the property held for the purposes thereof.

Then there is this proviso:

> . . . that so long as the Cheltonian Society shall remain in existence this present power shall only be exerciseable in pursuance of a resolution passed by the Cheltonian Society at a general meeting of its members and only in such manner and to such extent and with such objects as shall be set forth or prescribed in such resolution as aforesaid.

The stringency of the present times has made it desirable, in the eyes of the trustees, that they should have power, if occasion arises, to employ not only the income of the trust fund, but also part of the capital thereof, for the purposes mentioned in cl. 3. That view having been submitted to the Cheltonian Society in accordance with cl. 19 of the deed, the society has passed this resolution:

That cl. 5 of the trust deed of the Cheltenham College endowment fund, dated Sept. 27, 1917, which clause prevents the trustees from applying any of the capital of the fund towards the objects provided by cl. 3, be revoked, and the following clause be substituted therefor: "The trustees shall be at liberty to apply the whole or any part of the capital of the property to the general purposes of the trust for or towards any of the objects or purposes stated in cl. 3, as well as the income thereof."

The question which has been raised by the trustees is whether it is competent for such revocation and alteration of the provisions of the trust deed to be made. It is said by counsel for the president and council of the college that cl. 5, not being within the exception contained in cl. 19, can be revoked, and that, if it is revoked, then it is competent to vary the provisions of cl. 3 and cl. 4 so far as relates to the application of the income of the trust fund in perpetuity, and to authorise the disposition of part of the capital of the trust fund. That is to say, it is said here that, while there is in cl. 19 an express exception of cl. 3, there is no express exception of cl. 5, and, therefore, one can revoke cl. 5 and substitute for it a clause which will enable to be done that which, if cl. 3 had always stood alone, could clearly not have been done. I wish, from some points of view, that I could come to that conclusion, but it seems to me that that is not the meaning of this deed. Whether cl. 3 stands alone or whether it stands in conjunction with cl. 5, I can give it no other meaning than that it imposes upon the trustees of the trust fund the obligation to employ the income, and the income only, of the trust fund in perpetuity for one or other of the enumerated purposes. Cl. 5 as it is construed contains an express prohibition, but, in my view, that does not mean that cl. 3 has any other meaning than that which it naturally bears. Clause 5 was added, as lawyers say, *ex majore cautela*, in order to make it quite clear that this is a fund to be preserved in perpetuity and that the income only is to be used.

It is quite true that the matter would have been made clearer if the exception in cl. 19 had referred, not only to cl. 3, but also to cll. 4 and 5, but, in my judgment, the exception of cl. 3 from the power of revocation is sufficient to prevent the trustees from employing any part of the corpus of the fund, inasmuch as, reading cl. 3 by itself, that prohibition is implied. In those circumstances, with some regret, I must come to the conclusion that it is not competent to the trustees to make the proposed variation.

Declaration that proposed variation void. Costs of all parties as between solicitor and client to come out of the trust fund.

Solicitors: *Herbert Reeves & Co.* (for the plaintiff and for the first defendants); *Treasury Solicitor* (for the second defendant).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

FAULKNER *v.* FAULKNER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), **July 3, 4, 1941.**]

Divorce—Desertion—Desertion for 3 years immediately preceding presentation of petition—Respondent setting up case of desertion in answer—3-year A
period calculated from date of answer—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 180—*Matrimonial Causes Act,* 1937 (*c.* 57), *s.* 2.

Where the respondent by his or her answer sets up a case of desertion for more than 3 years, the period of 3 years is to be calculated from the date of the answer and not from that of the petition. B

[**EDITORIAL NOTE.** The point here is the short one whether the statutory period of 3 years should run from the date of the answer or from that of the petition, the statutory provision only referring to the date of the petition. It is held, however, that, where the respondent in the answer sets up a substantive case, the answer is really in the nature of a petition so far as the respondent's case is concerned, and authority for this view is found in the Supreme Court of Judicature C
(Consolidation) Act, 1925, s. 180.

FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 2, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, pp. 336, 337.]

HUSBAND'S PETITION for dissolution of marriage on the ground of his D
wife's desertion for three years and upwards immediately preceding the presentation of the petition. The facts are fully set out in the judgment.

R. Bush James, K.C., and *Hon. Victor Russell* for the petitioner.

R. T. Barnard for the respondent. E

HODSON, J.: This is a petition by the husband for dissolution of marriage on the grounds of the wife's desertion for three years and upwards immediately preceding the presentation of the petition, dated Apr. 16, 1940. By her answer, dated Aug. 23, 1940, the respondent F
denied the desertion, and alleged originally that the petitioner had deserted her

> . . . without cause for a period of three years and upwards immediately preceding the presentation of this answer.

The point was taken in the registry that the word " answer " should be G
altered to the word " petition " in view of the wording of the Matrimonial Causes Act, 1937, s. 2, which provides as follows :

> A petition for divorce may be presented to the High Court . . . either by the husband or the wife on the ground that the respondent . . . (*b*) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition. . . .

H

In this case, if the word " petition " is substituted for the word " answer " in this case, the wife would have no case as pleaded, because her husband's desertion would not have run for three years. I think that a wrong view was taken in the registry, and that the relevant period is the period preceding the answer, because, in these circumstances, the answer takes the place of the petition, and is in itself a petition praying at the end of it that the marriage may be dissolved and the petitioner condemned in the costs of the proceedings, and so on. This particular situation is dealt with by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 180, which provides as follows:

> A If in any proceedings for divorce the respondent opposes the relief sought, in the case of proceedings instituted by the husband, on the ground of his adultery, cruelty or desertion, or, in the case of proceedings instituted by the wife, on the ground of her adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

It seems to me that an answer is in exactly the same position as a B petition, and, for this purpose, the answer is the petition prior to which the three years' desertion must run.

Solicitors: *Charles Russell & Co.* (for the petitioner); *Blundell, Baker & Co.* (for the respondent).

C

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

R. *v.* HOME SECRETARY, *Ex parte* BUDD.

F

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Macnaghten and Stable, JJ.), **June 23, 24, July 2, 1941.**]

Emergency Legislation—Imprisonment under defence regulation—Member of organisation subject to foreign influence or control—Validity of order— G *Grounds of belief of Home Secretary—Sufficiency of statements in order—Rearrest of person arrested under invalid order—Habeas Corpus Act,* 1679 *(c. 2), s.* 6*—Defence (General) Regulations, reg.* 18B.

The applicant was detained under the powers given by the Defence (General) Regulations, reg. 18B, but was released on the ground that the order for his detention showed no proper ground for his detention and H did not comply with the requirements of the regulation. He was rearrested on June 6, 1941, under a fresh order, and, on an application for a writ of *habeas corpus,* he set up four contentions: (i) that the Home Secretary had no reasonable ground for thinking it necessary to exercise control over him, (ii) that the requirements of reg. 18B had not been complied with, (iii) that the British Union of Fascists was not an organisation of the character described in reg. 18B (1A) and (iv) that it was illegal to rearrest him on the same grounds as before. The Home Secretary in an affidavit stated the general nature of his information, that he had considered such information and confidential reports made by persons in responsible positions and accustomed to deal with such matters, and that he had reasonable cause to believe, and did believe, that it was necessary to exercise control over the applicant :—

Held : (i) it was sufficiently proved that the Home Secretary believed the applicant was a person whom it was proper to detain under reg. 18B (1A).

(ii) [Stable, J., *dissenting*] there was reasonable cause for such belief, although the information and reports on which the Home Secretary based his belief were not disclosed.

(iii) in the circumstances of this case, it was lawful to rearrest the applicant.

[EDITORIAL NOTE. The present case, by reason of the different results reached in the two proceedings against the applicant, shows the nature of the objections which can be successfully made against an order for detention under the regulation in question. The order must in form and content comply with the regulation, but the applicant cannot have access to the confidential information on which the Home Secretary has acted. As to the latter, the court must act upon the statement upon oath of the Home Secretary that he had such information and that he considered it sufficient to warrant the detention of the applicant. To many this must have seemed well-settled law before the decision in *Ex p. Lees* (1) and it is not thought that that decision enunciated any new principle of law on this subject, but the position is now rendered a little more difficult by the dissenting judgment herein of Stable, J. However, the better view seems clearly to be that the applicant here had all he was entitled to ask for under the decision of the Court of Appeal in *Ex p. Lees* (1) and the earlier authorities upon which that decision was based. The point as to the rearrest of the applicant is of importance at the present time, but it is conclusively shown that the applicant was never really in jeopardy on the first order, and, therefore, his arrest and release thereunder were not a bar to further proceedings. One small point remains to be mentioned. Reference is made to the Habeas Corpus Act, 1679. As in the case of many statutes of this date, the numbering of the sections differs in different editions of the statutes, and what is here referred to as section 6 will be found in some editions numbered as section 5.

As to Detention under Emergency Regulations, see HALSBURY, Hailsham Edn., Vol. 6, p. 533, para. 662 ; and for Cases, see DIGEST, Vol. 11, p. 552, Nos. 538-543.]

Cases referred to :

(1) *R.* v. *Home Secretary, Ex p. Lees*, [1941] 1 K.B. 72; Digest Supp. ; 110 L.J.K.B. 42 ; 164 L.T. 41.

(2) *Searche's Case* (1588), 1 Leon. 70 ; 16 Digest 269, *788*.

(3) *R.* v. *Brixton Prison (Governor), Ex p. Stallmann*, [1912] 3 K.B. 424 ; 16 Digest 252, *532* ; 82 L.J.K.B. 8 107 L.T. 553.

(4) *A.-G. for Colony of Hong Kong* v. *Kwok-a-Sing* (1873), L.R. 5 P.C. 179 ; 16 Digest 252, *531* ; 42 L.J.P.C. 64 ; 29 L.T. 114.

Application for a writ of *habeas corpus*. The facts are fully set out in the judgment of Viscount Caldecote, L.C.J.

J. Scott Henderson for the applicant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the respondent.

Viscount Caldecote, L.C.J. : This case raises questions of first importance, affecting not only the applicant and the duties and powers of the Secretary of State but also the public safety. The fact that it is not an isolated case, but in some degree is likely to determine the rights of a number of other British subjects at present deprived of their liberty, makes the questions raised even more deserving, if possible, of the gravest A consideration.

The applicant has twice been made the subject of an order of detention by the Home Secretary. He was first arrested on June 15, 1940, on the authority of an order made on June 11 by the then Home Secretary, Sir John Anderson. After 11 months' detention, the applicant was released B as the result of proceedings by way of application for a writ of *habeas corpus* made to this court. The ground on which that order of the Home Secretary was based was that he had reasonable cause to believe that the applicant and a number of other persons mentioned in the order had been or then were members of, or active in furtherance of the objects of, the C British Union of Fascists. It was apparently intended that the applicant should be given a copy of the Home Secretary's order, but, by an unexplained blunder, the document handed to the applicant contained a statement that the Home Secretary had reasonable cause to believe that the applicant and the other persons named were persons of hostile D associations and that, by reason thereof, it was necessary to exercise control over them. The document went on to say that, in pursuance of the power conferred on the Secretary of State by the Defence (General) Regulations, reg. 18B (1A), he directed that the persons mentioned in the schedule should be detained. This document was, as HUMPHREYS, E J., described it in the *habeas corpus* proceedings, "worthless." It not only did not give the applicant proper information to enable him to exercise his rights under reg. 18B (4), but it gave him wrong information, and moreover failed in its purpose of providing authority for the applicant's detention. For this and other reasons tending to show that no sufficient F care and attention was paid to the applicant's case by the Home Secretary, HUMPHREYS, J., not being satisfied that the Home Secretary had reasonable cause for the belief expressed in the order which he had in fact made, thought that the applicant ought to be released. The other members of the court, SINGLETON and TUCKER, JJ., concurred in this G result, TUCKER, J., confining his judgment to one point—namely, that there had been a failure to comply with reg. 18B (4), and that, consequently, the applicant had been deprived of his right to make representations to the Secretary of State, and ought, therefore, to be given his liberty. Accordingly, the applicant was released, but after a few days a fresh H order was made by the Home Secretary, Mr. Herbert Morrison, directing that the applicant should be detained. The order was in the following terms:

> Defence (General) Regulations, 1939. Detention Order. Whereas I have reasonable cause to believe Charles Henry Bentinck Budd to have been a member of, and to have been active in the furtherance of the objects of, an organisation as respects which I am satisfied (*a*) that the persons in control of the organisation have had associations with persons concerned in the government of, or sympathies with

> the system of the government of, a power with which His Majesty is at war, and (*b*) that there is danger of the utilisation of the organisation for purposes prejudicial to the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of war in which His Majesty is engaged or the maintenance of supplies or services essential to the life of the community and whereas I am satisfied that it is necessary to exercise control over him Now, therefore, in pursuance of the powers conferred on me by the Defence (General) Regulations, 1939, reg. 18B (1A), I direct, by this my order, that Charles Henry Bentinck Budd shall be detained.
>
> (Signed) Herbert Morrison.
>
> One of His Majesty's Principal Secretaries of State.

A true copy of this order was handed to the applicant when he was arrested, as he again was on June 6, 1941. Thereupon, the applicant made the present application for a writ of *habeas corpus*. The application is based on four grounds—namely, (i) that the Home Secretary had no reasonable cause for thinking it necessary to exercise control over the applicant, (ii) that there has been a failure to comply with the requirements of reg. 18B (4), (iii) that the Home Secretary had no reasonable cause for being satisfied that the British Union of Fascists was an organisation of the character described in reg. 18B (1A), and (iv) that it was illegal to rearrest the applicant on the same grounds as those on which he was arrested on the first occasion, the court having already ordered his release.

The court does not come to this application without the advantage of guidance as to the right approach to it. The judgment of the Court of Appeal, approving the judgment of this court, in *R.* v. *Home Secretary, Ex p. Lees* (1) has clearly defined the function of the court. MacKinnon, L.J., stated that counsel for the applicant in that case had said that the Home Secretary did not bring before the court what was the nature of the reports which he had studied, and that as he had not done so, the court ought to hold that he had not satisfied it that he had reasonable cause to believe as he had sworn that he had. MacKinnon, L.J., then said, at p. 84:

> That seems to me to suggest that in every case of this sort this court can be made to act as a court of appeal from the discretion of the Secretary of State and inquire into the grounds upon which he has come to the belief, and can consider whether there were any such grounds for belief, or, if there were any grounds, whether it was a reasonable belief. I do not think it is the function of the Divisional Court or this court in any way to act as a court of appeal from the discretionary decision which has to be made by the Secretary of State. He has sworn that he had grounds in the nature of those reports which were confidential and that he did come to the conclusion that there were clear grounds for believing and did in fact believe. I have his affidavit and I have no reason to think that it was otherwise than strictly honest and correct.

The judgments in the first proceedings by the applicant called attention to the wide powers conferred on the Secretary of State, and, on the other hand, emphasised the duty of the Secretary of State to act with the utmost care and accuracy so as to afford a person detained under reg. 18B the full rights to which he is entitled.

In referring to statements made by the applicant in an affidavit, Humphreys, J., said:

> Those are the facts which he states, and states on oath, and he says that those facts were known to the Army authorities when they re-engaged him. He therefore

has a grievance, in that he alleges that he has always been a loyal British subject, and that there is no reason why he should be detained in prison. Those are matters into which this court has no power to go, because we are bound by the terms of a decision of this court.

After quoting the passages from his judgment in *R.* v. *Home Secretary,*
A *Ex p. Lees* (1), which I have already read, HUMPHREYS, J., said :

> In my opinion, when this court is asked to accept statements in an affidavit that a Secretary of State in a particular case had reasonable cause to believe certain things without his having any opportunity of judging of the reasonableness or otherwise thereof, the court is entitled to demand that every safeguard afforded by the regulations to the subject shall be observed and preserved, and to look for and expect the utmost care and accuracy on the part of those who act in these matters for the
> B Secretary of State.

Similarly, SINGLETON, J., said :

> It is to be remembered that this country is at war, and, in these extraordinary times, Parliament has thought it right to give very wide powers to the Secretary of State. Equally it is to be remembered that those who have to exercise the powers
> C which are given to them are charged with a grave responsibility. The regulations provide certain safeguards, and, over and above that, those responsible for the exercise of powers under the regulations ought to remember that the subject with which one is dealing in this case is something affecting the liberty of the subject, and there ought to be careful consideration before an order depriving one of his liberty is made.

D Affidavits have been filed which have been sworn by the Secretary of State and by the applicant in the present proceedings. The first affidavit in point of time was that made by the applicant, who, after referring to his affidavit sworn in the earlier proceedings on May 6, 1941, said that no further information beyond that contained in the copy of
E the Secretary of State's order handed to him on June 6, 1941, had been given to him. It was true, he said that he had been a member of the British Union, but it was impossible for him to make representations to the Home Secretary unless he was informed of the precise grounds on which the Home Secretary was satisfied that it was necessary to
F exercise control over him. Since his release, he has done nothing which would give any ground to the Home Secretary to think that it was necessary to exercise control over him. The applicant referred to the steps taken in July, 1940, by the then Home Secretary to dissolve the British Union of Fascists and to seize its property, and he then challenged
G the statements contained in the Home Secretary's order of detention, finally asserting that he had been prevented from making representations to the Home Secretary under reg. 18B (4) because he had not been supplied with the precise grounds of his detention.

The Home Secretary in his affidavit in reply declared in para. 3 that,
H when he made the order of detention, he had reasonable cause to believe Budd to have been a member of, and to have been active in the furtherance of the objects of, the British Union, an organisation as respects which the Home Secretary was satisfied that the persons in control thereof had had associations with persons concerned in the government of, or sympathies with the system of the government of, a power with which His Majesty is at war, and that there was danger of the utilisation

of the organisation for purposes prejudicial to the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war in which His Majesty is engaged and the maintenance of supplies and services essential to the life of the community, and that he had reasonable cause to believe that it was necessary to exercise control over the applicant. He further said that, before he made the order, he carefully studied reports and considered information coming from persons in responsible positions, who are experienced in investigating matters of this kind, and whose duty it is to make such investigation and to report confidentially to the Home Secretary. He also considered the report of the advisory committee made when the applicant was previously interned. Then the Home Secretary added this statement :

> I had and have information as to the said Budd's membership of the organisation and as to his collaboration with those in control of it ; also as to acts in furtherance of and in sympathy with its objects after he had become an officer in His Majesty's Forces and during the war. Reviewing all the information I came to the conclusion and had reasonable cause to believe and did in fact believe that which is set out in para. 3 of this affidavit.

The applicant made a short further affidavit denying that at any time since he ceased to be a member of the British Union in July, 1939, he had done anything in furtherance of, or in sympathy with, its objects.

In these circumstances, there is a clear conflict of statement between the applicant and the Home Secretary. With one exception, the Home Secretary has not disclosed the facts or the reports or information on which he relies as giving him reasonable cause to form the belief set out in para. 3 of his affidavit. The one exception is that the applicant was formerly a member of, and active in the furtherance of the objects of, the British Union of Fascists. This fact is not disputed by the applicant.

It is plain, to my mind, that, if this court were to enter upon an inquiry as to the truth of the denials by the applicant of any acts in furtherance of, or in sympathy with the objects of, the British Union of Fascists, it would be engaged upon precisely that investigation which the Court of Appeal said was not the function of the court. It goes without saying that, if, on the face of the order made by the Secretary of State, it was apparent that the Secretary of State had not reasonable cause for his belief, there would be no valid ground for the detention of the applicant and he ought to be released. The same result would follow if the court were not satisfied that the Home Secretary had reasonable cause for his belief. In the first application, HUMPHREYS, J., was not so satisfied, and I gather that this was also the opinion of SINGLETON, J. The reason for their view was the unsatisfactory nature of the documents in the case, such as the absence of any statement that it was necessary to exercise control over the applicant, the inclusion in one order of a large number of persons, the mistakes in the supposed copy of the Home Secretary's order handed to the applicant, and the fact that the affidavit of Sir John Anderson, formerly Home Secretary, had been sworn many months after the original order for the applicant's arrest had been made.

In the present application, none of these circumstances is found. The order is made in due form. It deals only with the case of the applicant. The Home Secretary's affidavit speaks as to the consideration which he gave to the case a very short time ago, and an accurate copy of the Home Secretary's order was given to the applicant. I see no reason to doubt that the Home Secretary has given proper and careful consideration to this particular case, and that he has considered reports and information which appear to him to justify his belief. If the Home Secretary had not stated any ground at all upon which he made the order—that is to say, if the order had been what in the course of the argument was called a bare order for the applicant's detention—the contention that the applicant is not aware of the grounds on which the order has been made might have required more consideration. In fact, however, the Home Secretary, as I have pointed out, states in the order a fact as to the applicant's membership of the British Union of Fascists, which is admitted by the applicant. It is true that the contention was also advanced by counsel for the applicant that the Home Secretary had no ground upon which he could be satisfied that the British Union of Fascists was an organisation of the character mentioned in reg. 18B (1A), but I find it impossible to accept the last contention, having regard to the fact that, on the statement of the applicant himself, action has been taken—and taken, so far as we are concerned, without challenge as to the legality of the action—against the British Union of Fascists under reg. 18AA as an organisation to which the regulation applies.

That being so, two out of the four conditions which counsel for the applicant pointed out are required by reg. 18B (1A) seem to me to be clearly satisfied. The first is that the Secretary of State had reasonable cause to believe that the applicant has been a member of the British Union of Fascists, and the second is that the Secretary of State was satisfied on proper material that the British Union of Fascists was an organisation of the character mentioned in reg. 18B (1A). The other two conditions which have to be fulfilled are (i) that the Secretary of State is satisfied that there is danger of the utilisation of the organisation for purposes prejudicial to the public safety, the defence of the realm, the maintenance of public order, and so on, as stated in the regulation, and (ii) that the Secretary of State has reasonable cause to believe that it is necessary to exercise control over the applicant. These last two conditions are, by their nature, bound to be largely a matter of opinion. The Secretary of State has declared on oath, as well as having stated in the order, that he is satisfied as to the first of these conditions, and, as to the second, that he is satisfied, or has reasonable cause to believe, that it is necessary to exercise control over the applicant.

Counsel for the applicant placed strong reliance on the absence of any statement of the precise grounds for his belief. Those words " the precise grounds " are to be found in the passage from the judgment of HUMPHREYS, J., which I have quoted. An argument was based on those words to the effect that the applicant must be furnished with details of the matters which have affected the Home Secretary's mind. Let it be supposed that these details had been given. Is the court then to decide upon evidence the proper view to take of the facts? The submission of counsel for the applicant was that the details must be given in order both to enable the applicant to make representations to the Secretary of State and to allow the court to satisfy itself that there were in fact proper grounds for the order. As to the first point, I observe that reg. 18B (5) requires the chairman of the advisory committee to inform the person detained, if he makes objections to the committee (as he is entitled to do), of the grounds on which the order has been made, and to furnish him with such particulars as are, in the opinion of the chairman, sufficient to enable the objector to present his case. That seems to me to point to the conclusion that these grounds and particulars need not necessarily have been given to the person detained at the time when the order was made. If it is suggested that at any rate the court should be afforded this information to enable it to discharge its duty to see whether, in the words of MacKinnon, L.J., in *Lees*' case (1), at p. 84, "the Secretary of State had reasonable cause to believe and did honestly believe," this contention was rejected by the Court of Appeal. When Humphreys, J., said that the person detained is entitled to know at the outset the precise grounds of his detention, he cannot be understood to say something different from what he had said, or MacKinnon, L.J., had said, in *Lees*' case (1). Indeed, Humphreys, J., expressly relied on the judgment of the Court of Appeal, approving his own previous judgment, as binding on him. In *Lees*' case (1), neither the court nor the applicant had any more information than is available in the present case.

In my opinion, the applicant here has been furnished, as he was not in the first proceedings, with the accurate—or, as Humphreys, J., called them, the precise—grounds of his detention. That being so, as I am not aware of any reason for thinking that the statements of the Home Secretary cannot be accepted, I have come to the conclusion that the Home Secretary had, when he made this order, reasonable cause to believe as he did.

It remains to deal with the last ground on which this application was based—namely, that it was illegal to rearrest the applicant on the same grounds as those on which he was arrested on the first occasion, the court having already ordered his release. Two authorities were cited to us in this connection. The first was *Searche's Case* (2) in the reign of Queen Elizabeth. In that case, of which there is a very brief report, Searche had been arrested, on grounds which it is not necessary to state, and, upon a return of a rule for a writ of *habeas corpus*, had been discharged. After the discharge, the same parties had caused Searche to be arrested again for the same cause, and an attachment was granted against them.

If this is an authority for the submission of counsel for the applicant, it is hardly needed. *Searche's Case* (2) was before the two Habeas Corpus Acts passed in 1640 and 1679 in the reigns of Charles I and Charles II respectively. Our attention was called to the Habeas Corpus Act, 1679, s. 6, which prohibits under penalty a recommittal for the same offence of a person once delivered by *habeas corpus*. It may be doubtful whether the Act extends to such cases as the present, but the real question we have to decide is not whether a person can be re-arrested after successful *habeas corpus* proceedings on the same grounds, but whether this is a case of that description.

Some light is to be obtained from the judgments of a Divisional Court in *R.* v. *Brixton Prison (Governor), Ex p. Stallmann* (3). The decision of the court was that the Habeas Corpus Act, 1679, s. 6 applies only where the return to the second writ of *habeas corpus* raises for the opinion of the court the same question with regard to the validity of the grounds of detention as the first. PHILLIMORE, J., at p. 448, referred to a decision of the Privy Council in *A.-G. for Colony of Hong Kong* v. *Kwok-a-Sing* (4) as giving the true interpretation of the section :

> The section was directed against reiterated commitments, as it says, for the same offence. Persons were committed ; they were enlarged upon bail or their recognisances to appear. In those days it was frequently a very lengthy process to persuade the court to go as far as that ; and in addition there was the danger that a fresh warrant would be issued, and that the person again arrested upon it would be compelled to sue out a second writ of *habeas corpus*, remaining in custody meanwhile ; and it was intended by that section to enact that as long as he had done nothing to forfeit his recognisance, or which justified the court in calling upon his sureties to show cause why their bail should not be estreated, he should not be re-committed upon the same charge, power being given to the court before which the recognisance to appear was given to determine judicially, if it thought fit, that circumstances existed in which the person must be committed to prison, notwithstanding that at one time he was released upon bail, the like power being given also to any other court, having jurisdiction over the cause by reason of a transfer to it having taken place either, as MELLISH, L.J., suggested, by *certiorari* or otherwise. I doubt if the section was intended to go any further, but MELLISH, L.J., suggests—and it may be so—that a case would come within the mischief of the statute if, with a colourable variation, the man was rearrested substantially for the same cause . . . But though the second arrest is for the same cause, if the prisoner's discharge was because the warrant or the return to the writ of *habeas corpus* was bad, then it would be lawful to rearrest for the same offence with a proper warrant, upon which a different return would be made.

This exposition of the Habeas Corpus Act, 1679, s. 6, may fitly be regarded as laying down a principle of general application to all *habeas corpus* proceedings. Even so, however, it does not appear to me to help the applicant's contention. The answer of the Secretary of State to the application in the case of the first arrest was held bad for the reasons I have mentioned, and, in my opinion, it was lawful to make a second order for the applicant's detention in such circumstances and in such form as to admit of a different result. I also think that in any case the second detention was not for the same cause as the first. On the whole case, therefore, I hold that the answer of the Home Secretary to the application is sufficient, and that there is no ground on which we ought to find the detention of the applicant illegal.

I should add that MACNAGHTEN, J., has asked me to say that he has read this judgment which I have just delivered, and that he agrees with it entirely.

Stable, J.: In this case, I have had the advantage of reading the judgment of the court which has just been delivered by Viscount Caldecote, L.C.J. While respectfully and in substance agreeing with the statement by Viscount Caldecote, L.C.J., of the principles which regulate this court in dealing with applications of this kind, and though the point at which my judgment diverges from that of the court is more as to the application of the principles than the principles themselves, the matter being of first importance, I feel it my duty to express those differences and the grounds on which I have come to a conclusion which is not that which the court has reached.

As Viscount Caldecote, L.C.J., has pointed out, the function of this court is not to act as an appellate tribunal reviewing the decision of the Secretary of State or the sufficiency of the evidence on which the Secretary of State acted, nor, where there is a conflict of evidence, to indicate on which side the probability of the matter lies. These functions and duties have been entrusted by the legislature to the Secretary of State. The function of the court is, as I understand it, in cases such as the present one, where no irregularity in the form of the proceedings is alleged, simply to determine whether the Secretary of State entertained, and had reasonable cause for, the belief which is the basis of the decision to which he has come. Once the existence of the belief based on reasonable cause is established, it is, in my judgment, immaterial whether or not the court would have reached the same conclusion as the Secretary of State. His decision on the matter is final.

The questions, therefore, and the only questions, in this case for the court to determine are, in my judgment, (i) did the Secretary of State hold a particular belief? (ii) was there reasonable cause for this belief? and (iii) (which is an ancillary matter) what material in this particular case ought to be before the court in order to enable it to provide the proper answers to the first and second questions? I can dispose of the first question in a few words. I do not doubt that the Secretary of State entertained the belief on which he acted, and, for myself, I require, in order to reach so obvious a conclusion, no more than the bare statement on oath of the Secretary of State that such was the fact.

It is, I think, convenient, before expressing the view I have formed as to the existence of reasonable cause for the Secretary of State's belief and consequent action, to deal with the ancillary question—namely, as to the sufficiency or otherwise of the material before the court to assist it in reaching a conclusion. It is, in my judgment, clear both on principle and authority, that, before the court can come to any satisfactory conclusion, there must be some material before it in addition to the mere assertion of the Secretary of State; "I believed and there was reasonable cause for my belief." Implicit in the statement "I believed" is the further statement that the person expressing the belief has in his judgment reasonable cause for so believing, from which, I think, it follows that the court is entitled in every case to some additional material over and above the bare assertion of the Secretary of State on which to base its conclusion as to whether or not reasonable cause existed. The inquiry as to the existence or otherwise of reasonable cause must, in my judgment, involve some examination of the facts relied on as constituting such reasonable cause, and, speaking for myself, I find myself quite unable to start out on the inquiry, much less reach a conclusion, if I am to remain throughout in complete ignorance of what that cause is alleged to consist of.

I do not propose, more particularly as this is a dissenting judgment, to go further than is absolutely necessary in expressing my views as to the general principles applicable in all cases on this point. The general principle has been laid down in the judgment of the Divisional Court in *R.* v. *Home Secretary, Ex p. Lees* (1), where HUMPHREYS, J., in delivering the judgment of the court (a judgment which was expressly approved by the Court of Appeal), said, at p. 78;

> Now the court entertains no doubt that upon an application for a writ of *habeas corpus* the court has power to inquire into the validity of the order of detention, and for that purpose to ascertain whether the Home Secretary had reasonable cause for the belief expressed in the order.

Later, he said, at p. 79:

> How then is a court to decide the question whether the Secretary of State had reasonable suspicion for his belief? In our opinion, no general rule can be laid down and each case must be decided upon its own facts.

Substituting the word "cause" for the word "suspicion," with that expression of opinion, which is binding upon me, I most respectfully agree. An affidavit in stock form, applicable to all cases and, as LANGTON, J., expressed it in a recent case, "over the rubber stamp," is, in my judgment, undesirable in almost any proceedings, and most particularly undesirable in proceedings of this nature, where the liberty and the reputation of the subject are involved and in which, consequently, particular individual attention must, as a matter of right, be given to every relevant factor.

In applying the principle laid down by the Divisional Court and approved, as I understand it, by the Court of Appeal, there are two features of the present case to which I wish, briefly, to allude. The first is that Captain Budd was rearrested by order of the Secretary of State within a few days of this court, on an earlier application for a writ of *habeas corpus*, having ordered him to be set free, and the second is certain unchallenged and uncontradicted facts relating to Captain Budd's earlier history. The law is no respecter of persons, which means, as I understand it, that the law respects all persons alike. None the less, I think that the court, in a case of this nature, is entitled to have some regard to known and undisputed facts in Captain Budd's past life. The only facts to which I wish to refer are these. At the outbreak of the last war Captain Budd, then only 18 years of age, enlisted in His Majesty's Army. He rose to the rank of captain, and, after being severely wounded in the head, was discharged in 1919 with a 70 per cent. disability pension for life. On the outbreak of the present war, he again volunteered his services, was granted a commission in His Majesty's Army, and, at the time of his first detention in 1940, was actually serving in His Majesty's Army with the rank of captain and holding the position of adjutant. The Attorney-General has told the court that, in the course of the applicant's military service in the present war, no report adverse to Captain Budd in relation to the discharge of his military duties has been made by any commanding officer under whom Captain Budd has served.

If the order for Captain Budd's release on his earlier application to this court for a writ of *habeas corpus* had been based solely on the fact that there was some irregularity or informality in the procedure, the first feature would, in my judgment, have been unimportant. This, however, is not the case. Undoubtedly the court held that irregularity and informality there had been, and one member of the court based his judgment solely on that point. None the less, it is, I think, sufficiently plain that HUMPHREYS, J., who presided, based his judgment, to some extent at least, on the fact that, in his view, on the material then before the court, he was not satisfied that reasonable cause existed for the belief which was the basis of the order on which Captain Budd was detained by the Secretary of State. He said:

> I would only add that, in my opinion, this is just the case which was in the minds of the members of the court who were responsible for the judgment in *Lees'* case (1) when they observed that, not only has this court power to inquire into the validity of the order of detention, but, for that purpose, it will ascertain whether the Home Secretary had reasonable cause for the belief expressed in the order. For my part, I am not satisfied in this case that the then Home Secretary had reasonable cause for his belief that it was necessary to exercise control over Captain Budd, and, on that ground, I think he ought to be released.

Although SINGLETON, J., did not think that it was necessary to decide the case upon that particular issue, it appears that he shared, and certainly did not dissent from, the view expressed by HUMPHREYS, J. He said:

> But again I say that, if the case had to be determined upon this issue, I doubt very much whether the then Home Secretary, when he formed his view about the matter, had before him such matters upon which he could form such a view reasonably.

The matter would, I venture to think, be tolerably clear if the earlier decision of the court which resulted in Captain Budd's release had rested solely on the ground that the court was not satisfied as to the existence of reasonable cause. None the less, and particularly in a case in which the liberty of the subject is involved, the presence of irregularity and informality for which Captain Budd was in no way responsible in the procedure leading up to his arrest ought not, in my judgment, to deprive him of the benefit of the considered views of one if not two members of the court which ordered his release, and which, but for the presence of the formal defects to which I have referred, would or might have been the basis, and the sole basis, of an order identical in effect with the one he was successful in obtaining.

A Where, as here, as appears from the passages in the judgments I have read, two members of the court have, to say the least of it, expressed the gravest doubts as to the existence of reasonable cause, and the release consequent on that order of the court is followed by the almost immediate rearrest and detention of the subject without trial, in my judgment B it is incumbent on the Secretary of State, on a subsequent application to this court by the subject for like relief, to make this plain at least—namely, whether the grounds of the second detention were identical with, or supplementary to, or different from, those on which the first detention was based. When Captain Budd was detained by the Secretary C of State for the second time, the Secretary of State may have rested his decision solely on matters which had taken place prior to, and were the basis of, the first detention, or on those grounds together with additional acts or things or matters which had come into being after the date of Captain Budd's earlier detention, or which, if they had happened before D that date, had only come to the notice of the Secretary of State since the first order was made. The importance of avoiding any ambiguity on this matter is clear, I think, when it is remembered that the applicant is contending that release by order of the court on an application for a writ of *habeas corpus* may be, in certain circumstances, and is, in the circumstances E of this case, a bar to a fresh detention based on the same grounds as that on which the order for the earlier detention was made. In view of the particular circumstances of this case to which I have referred, I find the material now before the court insufficient to enable me to come to a conclusion one way or the other as to the existence of F reasonable cause. It is hardly necessary to say that I do not suggest for a moment that the Secretary of State is wilfully withholding material from the court. I have no doubt that, in presenting his affidavit in the form which it bears, he was acting on advice and seeking to observe the principles laid down in *R.* v. *Home Secretary, Ex p. Lees* (1). I venture G to think, however, that the passage in the judgment which I have cited was overlooked, or, at any rate, has not received the attention which, in my judgment, it deserves.

Para. 4 of the Secretary of State's affidavit is in the following terms:

> Before I made the said order I carefully studied reports and considered information H coming from persons in responsible positions who are experienced in investigating matters of this kind and whose duty it is to make such investigations and to report confidentially to the Secretary of State for the Home Department. I also considered the report of the advisory committee made when the said Budd was previously interned. I had and have information as to the said Budd's membership of the organisation and as to his collaboration with those in control of it; also as to acts in furtherance of and in sympathy with its objects after he had become an officer in His Majesty's Forces and during the war. Reviewing all the information I came to the conclusion and had reasonable cause to believe and did in fact believe that which is set out in para. 3 of this affidavit.

I confess that this leaves me in a state of complete ignorance as to why (apart from the matters which led to the earlier detention, as to which I know something, but not much) Captain Budd is now detained. This, however, does emerge from the affidavit, that some at least of the grounds of Captain Budd's present detention are the same grounds as those on which the order for his earlier detention was made. Captain Budd, in the exercise of his rights in the course of his earlier detention, came before the advisory committee. Reg. 18B (5) provides as follows :

> It shall be the duty of the chairman to inform the objector of the grounds on which the order has been made against him and to furnish him with such particulars as are in the opinion of the chairman sufficient to enable him to present his case.

In accordance with reg. 18B (5), Captain Budd was given a written document, the substance of which is that Captain Budd had been since 1934 a member of an organisation or association known as the British Union, which was of a subversive character and controlled or influenced by persons in sympathy with the present system of government in Germany, and that he had served as an official of that union in various capacities, and had been active in the furtherance of its objects. As I have already said, I venture to think that Humphreys, J., at least entertained and expressed the view—and, indeed, made it a part of the foundation on which he rested his decision—that the grounds set out in that document did not constitute reasonable cause for the belief held. Reverting to the Secretary of State's affidavit which is before the court in the present proceedings, the Secretary of State says :

> I had and have information as to acts in furtherance and in sympathy with the British Union after Captain Budd had become an officer in His Majesty's Forces and during the present war.

If the acts there referred to were acts which were within the knowledge of the Secretary of State before the order for the earlier detention was made, no indication of any sort is given in the written document given to Budd as to the nature, or even the existence, of the acts to which criticism is directed, with the result, in my judgment, that that document is not in conformity with the terms of reg. 18 (5).

If reference is made to some acts which have come to the notice of the Secretary of State since the date of the first order, this fact should, in my judgment, have been clearly stated in the affidavit. Bearing in mind that it is no part of the function of this court in the exercise of this jurisdiction to consider the sufficiency of any evidence there may be, or, where there is a conflict of evidence, to weigh that evidence, or to express any conclusion which otherwise it might have reached on the subject (a function which is delegated to the Secretary of State), none the less, I think that I am entitled to look at Captain Budd's affidavit, sworn in these proceedings on June 23, 1941, in which he says :

> I have not the slightest idea what is referred to by the Home Secretary when he speaks of acts in furtherance of and in sympathy with the objects of the British

> Union, but I desire most emphatically to deny that at any time since I ceased to be a member of the British Union in July, 1939, I have done anything in furtherance of its objects and that I have done anything in sympathy with its objects.

If I can believe Captain Budd, he has not the slightest idea to what the Secretary of State refers when he speaks of these acts, and in that respect I find myself exactly in the same position as Captain Budd. I have not the slightest idea either. If these acts are not relied on as reasonable cause, or part of the reasonable cause, for Captain Budd's detention, I do not know why any reference to them appears in the affidavit. If they are so relied on, I am equally at a loss to know how I can entertain any view as to the reasonableness or otherwise of that cause when the acts or facts which constitute it remain in complete and absolute obscurity.

In the result, in the absence of any material on which to base a conclusion, I am unable to express any view as to the reasonableness of the cause for the belief which has resulted in Captain Budd's detention. Accordingly, as in order to maintain the detention this court must be satisfied of the reasonableness of the cause leading to the belief, if the matter came to be determined on such material as we now have, in my judgment Captain Budd should be released. If the Secretary of State, acting, as I think he has acted, on a mistaken view of the principle laid down in *Lees'* case (1), is desirous of bringing additional facts to the notice of the court, I think that the proceedings should be adjourned to enable him to do so. At what conclusion I should then arrive would depend, of course, on the nature of the additional material.

As to the second point which was taken by the applicant—namely, that the earlier order of the court is a bar to his rearrest—it appears to me to be clear from the authorities to which VISCOUNT CALDECOTE, L.C.J., has referred that, if the first order of release had been made solely on the ground, to use a colloquialism, that the Secretary of State had not got his tackle in order, that would not preclude him from remedying the defect in the tackle and re-arresting Captain Budd when the tackle had been put straight, notwithstanding the earlier order of the court. If, however, the basis of the earlier order of the court was that the material presented to it did not amount to reasonable cause for the belief entertained, then, in my judgment, it would not be competent for the Secretary of State to rearrest Captain Budd on substantially the same grounds and to meet the subsequent application to this court for a writ of *habeas corpus* with a contention that the court on the first occasion had come to the conclusion it did on insufficient material. To hold otherwise would, in my judgment, lead to the impossible situation that there might be an indefinite number of arrests of the same person for the same reasons, each followed by an application to the court resulting in an order of release and culminating in a fresh arrest, the contention before the court on the second and subsequent applications successively and successfully being that the earlier orders had been made on insufficient material, until perhaps ultimately the court would be provided with just sufficient material to enable it to say that it was satisfied as to the existence of reasonable cause. Such a result would be, in my judgment, a clear contravention of the principle that neither the court nor the litigant must be vexed twice in the same matter, and that no unsuccessful litigant can come back on a second—or, indeed, an indefinite—number of applications to determine an issue which he has already lost at least once, on the submission that, if on an earlier occasion the court had been given information which he had available but had withheld, it would or might have come to an opposite conclusion to the one reached.

The difficulty I now find myself in by reason of the paucity of the information before the court illustrates, in my judgment, the advantage of presenting to the court, where an application of this sort is made, the fullest material possible, so far as is consistent with the public interest and the public safety. By this I must not be understood to mean that the Secretary of State should inform the court as to the sources from which his information is derived, but he should, except perhaps in exceptional cases, set out the material facts which constitute the reasonable cause for the belief on which the order made rested. An analogy can be found in the rule which regulates pleadings, that a pleading must state all the material facts but need not disclose the evidence by which those facts are to be established.

In conclusion, I would only add that, in my judgment, where, as in the present case, a rearrest follows close on an order for release made by the court, and a second application is made for a writ of *habeas corpus* to put an end to the second detention, it is additionally desirable that the fullest disclosure should be made. There must, I think, in such a case as the present, be a real danger that uninstructed persons, ignorant of the somewhat restricted area within which this jurisdiction is exercised, on reading that a British subject had been released by order of the court, had then been rearrested, and had made a second but unsuccessful application to the court for his release, would draw from the fact that the second application to the court has been unsuccessful some inference highly detrimental to the reputation of the subject concerned. The advisory committee, before which Captain Budd's application will in all probability in due course come, will not, of course, fall into similar error.

The conclusion at which, speaking for myself, I have arrived may be summarised in a very few words. Being in ignorance of the nature of any fact relied on as constituting reasonable cause for the belief which is the foundation of Captain Budd's detention, other than the facts, such as they were, which were before the court in the earlier proceedings, the sufficiency of which has already been doubted by two members of that court—even if, as appears to be open to question, one member of that court did not actually in part rest his decision on the proved insufficiency of that material—I am unable to say that I am satisfied of the existence of reasonable cause for the belief entertained by the Secretary of State, and, accordingly, Captain Budd is entitled to be restored to liberty.

Application dismissed with costs.

Solicitors: *Oswald Hickson, Collier & Co.*, agents for *Marsh & Ferriman*, Worthing (for the applicant); *Treasury Solicitor* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CATTERMOLE *v.* REIGATE CORPORATION.
KNEEN *v.* WOKING ELECTRIC SUPPLY CO., LTD.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **June 23, 24, 25, 26, July 7, 8, 1941.**]

Income Tax—Deductions from profits—Capital expenditure—Amortisation of capital—Electricity undertaking to be sterilised for purposes of centralisation of supply.

Two separate, but (as found by the court) in effect similar, agreements were made between the respondents and the joint electricity authority. The object of these agreements was to provide for the transitional period between the date of commencement of these agreements (up to which time the undertakers had supplied all electricity required in their districts) and the time when all electricity required in those districts should be supplied in bulk by the authority. During this transitional period the undertakers were to operate their generating stations as the agents of the authority and the authority was to pay the undertakers for so operating the stations an annual sum made up of the true operating costs and the sum required by the undertakers for amortisation of their capital expenditure. The undertakers were to pay the authority for all electricity supplied, whether generated at the station of the undertakers or supplied from the bulk supply of the authority. It was specially provided that, if, in any year of supply, the amount to be paid by the undertakers for electricity should fall below the sum to be paid by the authority to meet the capital amortisation charges, the amount paid by the undertakers must be made up to the latter sum. For the Crown it was contended that this was a mere price-fixing agreement, but the undertakers contended that the sum to be paid to them was a capital sum, paid either as an inducement to enter into the agreement or as consideration for the sterilisation of the undertaking:—

HELD: the effect of the agreements, upon their proper construction, was not to place upon the authority a duty to pay a capital sum to be spent as such by the undertakers in liquidating their amortisation charges. The profits for the purposes of income tax must be ascertained before the deduction of the amount applied to capital amortisation, and the amount so applied must be paid out of the taxed profits.

[**EDITORIAL NOTE.** As the result of legislation which commenced with the Electricity (Supply) Act, 1919, the supply of electricity in the United Kingdom has been centralised. In place of a large number of local authorities and statutory companies generating in small stations, there has been established a small number of joint authorities supplying electricity in bulk from large generating stations.

The change-over necessarily extends over a number of years, and the agreement here considered is for the purpose of providing for that transitional period. Local authorities supplying electricity were compelled to form a sinking fund whereby the loans which provided for their capital expenditure were to be repaid within a fixed period. This sinking fund was provided by what are here called the capital amortisation charges. Although the assessment to income tax is here entirely dependent upon the construction of the agreement here considered, it is thought that the decision herein will affect many similar agreements entered into by other undertakers. The contention for the undertakers was that the payments to be made to them by the joint authority were capital sums to be expended by them as capital in the repayment of their loans or capital and that they entered into the agreements on this understanding. The court have, however, decided that the position as to repayment of capital was left untouched by the agreements, and that this was the intention of the parties to those agreements. In the normal course a trading concern can only repay capital out of taxed profits and the assessment for income tax purposes must be made without any deduction of the sums spent in such reduction.

As to Profits of Municipal Corporations and Statutory Bodies, see HALSBURY, Hailsham Edn., Vol. 17, p. 105, para. 199; and for Cases, see DIGEST, Vol. 28, pp. 20, 21, Nos. 100-107.]

Appeals from decisions of Lawrence, J., relating to the income tax assessments in respect of the profits of the electricity undertakings of the Reigate Corporation and the Woking Electric Supply Co., Ltd. In each case the questions at issue turn on the construction and effect of certain agreements in very similar form made by those undertakers respectively with the London and Home Counties Joint Electricity Authority, that made with the Reigate Corporation being dated May 20, 1932, and that made with the Woking company being dated Sept. 30, 1933. The facts are fully set out in the judgment of the court delivered by Clauson, L.J.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the Crown.

Cyril L. King, K.C., and *F. Grant* for the Reigate Corporation.

Roland Burrows, K.C., and *J. Alan Bell* for the Woking Electric Supply Co., Ltd.

Clauson, L.J. [delivering the judgment of the court]: Until 1932, the electrical undertakings of the two undertakers were operated under electric lighting orders in the usual and familiar form, dating back in the case of Reigate, to 1897, and, in the case of Woking, to 1900. Each undertaker generated its own electricity and supplied it to its local consumers in the usual way. A vital change in this position occurred in the case of Reigate when the corporation entered into the agreement of May 20, 1932, with the joint electricity authority, and, in the case of Woking, when that company entered into a similar agreement of Sept. 30, 1933.

Before I proceed to examine those agreements, it is desirable to state shortly the results of certain legislation which took effect in and after 1919, and of certain steps taken under that legislation. Under an Act of 1919, the electricity commissioners came into being for the purpose

of reorganising the supply of electricity throughout the United Kingdom. Those commissioners have power, under sect. 11 of that Act, to control the extension of any existing generating stations. In 1925, the commissioners made an order constituting an area, which includes both Reigate
A and Woking, as a separate electricity district, and established and incorporated the London and Home Counties Joint Electricity Authority (hereinafter called the J.E.A.) as the joint electricity authority for the district. From the recitals in the order, it appears that the commissioners were of opinion that the important economies to be
B brought about by the reorganisation of the supply of electricity in the separate district could be secured only by a centralised system of generation and the inter-connection of the principal generating stations in the district. In 1926, under the Electricity (Supply) Act, 1926, a body was set up called the central electricity board (hereinafter called the board).
C This body was charged with the duty of supplying electricity to authorised undertakers, an expression which includes the J.E.A., the Reigate Corporation and the Woking company. Provision was made by the Act for determining what generating stations were to be "selected stations" —that is, stations at which electricity should be generated for the
D purposes of the board. The Act provides in regard to other stations (referred to as non-selected stations) means whereby, under certain conditions, the commissioners, if satisfied that such a step would be in the interests of economy, might compel the undertakers owning those stations to take a bulk supply from the board and cease the generation
E of electricity at their stations. The stations of the Reigate Corporation and of the Woking company never became selected stations, and, accordingly, fall within the class of non-selected stations.

The next step towards the reorganisation of the supply of electricity in the district was the making on Apr. 12, 1929, of an agreement between
F the board and the J.E.A. This agreement recites that the board and the J.E.A. are agreed that it will not be in the best interests of electrical development in the district that non-selected stations should be extended, that, in order to avoid the unnecessary extension of non-selected stations, it is desirable that there should be available to the owners thereof an
G adequate alternative supply of electricity at a cost less than that at which they could give a supply if their non-selected station were extended, and, therefore, that the board and the J.E.A. should enter into the arrangement therein contained for enabling the J.E.A. to afford the owners of those stations the supplies of electricity which they required. The
H agreement proceeds to make provisions which can be sufficiently summarised as follows. The J.E.A., in consultation with the board, are to confer with the several undertakers owning non-selected stations in order to reach an agreed estimate of the total cost of generating under individual development at the non-selected station the electricity required by the undertaker for the first 7 years in order to calculate the kilowatt charge and unit charge which represents such total cost. The

total cost is to be calculated by including, with other relevant items, interest on, and proper provision for the repayment of, outstanding capital expenditure, as well as of any new capital expenditure which would have been incurred during the 7 years. These figures having been reached, the J.E.A. are to make arrangements with each undertaker under which he is to work his non-selected station according to A directions given by the J.E.A. with the approval of the board, and the J.E.A. are to agree to pay the undertaker the sums actually paid by the latter in respect of each year of account under the same heads as appear in the estimates, and the J.E.A. are to agree to supply the undertaker B with all the electricity required for his undertaking at charges less than the kilowatt and unit charges calculated on the cost as estimated on the above lines of the generation during the relevant period under individual development. It is provided that the agreements so negotiated are to continue for 7 years, and thereafter until the respective undertakers C take the whole of their supply from the board through the J.E.A. The board are to supply the J.E.A. with all the electricity required to enable the latter to carry out its obligations under the agreements to the various undertakers, and the J.E.A. are to pay the board sums which are to be so fixed as to amount (subject to certain expenses) to the net revenue D which the J.E.A. will get from the respective undertakers. If the board and the J.E.A. agree on the terms to be offered to an undertaker, but the latter does not accept them and insists on applying to the commissioners for leave to extend his own non-selected station, the board and the J.E.A. are to join in opposing his application to the commissioners. E

It is material to observe that the point of the arrangement thus made between the board and the J.E.A. is that those two bodies in co-operation are to bring pressure to bear on the undertakers with non-selected stations, with a view ultimately to making them give up separate generation of electricity and become mere distributors to their own customers F of electricity centrally provided by the board. The position is complicated by the expectation that a period of about 7 years was likely to elapse before the board would have completed their arrangements for the central production of sufficient electricity to supply the total requirements of the undertakers, and by the arrangement that, during this G period, generation should continue at the stations, being supplemented by a bulk supply provided by the board on terms attractive to the undertakers.

The question at issue will be found to turn in great measure on a consideration of the means ultimately adopted for enabling the undertakers H to discharge their capital liabilities incurred for erecting and equipping their generating stations, which, when the scheme was fully worked out, would obviously become sterilised and practically valueless. As the matter stood before the changes of 1932 or 1933, the undertaker obviously had to do his best so to arrange his charges to his customers as to cover by means of those charges (i) his annual working expenses of generating and distributing electricity, and (ii) a proper contribution towards the gradual amortisation of his capital expenditure. He would have to pay income tax on the balance of receipts from his customers over his annual working expenses, with the benefit, possibly, of some A allowance for wear and tear and so forth, but his annual contribution towards the gradual amortisation of his capital expenditure in substance would have to be provided out of this taxed fund of profit. In other words, he would in effect pay tax on the amount of profits which he might use for amortisation, or, to put the point rather more accurately, the fact B that he would be using part of his profits for capital amortisation would not protect him from paying tax on the whole of his profits, including the part so used for capital amortisation. It may be convenient, for the sake of clarity here, to interpose the observation that the effect of the main contentions put forward by the two undertakers, and in substance C accepted by the commissioners and by the judge in the cases now before this court, will be found to be that the undertakers insist that the effect of the agreements of 1932 and 1933 has been to put them in the position (highly favourable to themselves as against the income tax authorities) of thenceforward meeting their amortisation liabilities D out of a capital fund which is not subject to tax, thus being relieved from bearing tax on the money required to meet those amortisation liabilities, even though in fact the money in question is provided by so adjusting the costs of producing the electricity as to leave available from the sum paid by the consumers a margin which will meet their amortisation E requirements, or, to put the matter in simpler language, even though the amortisation is in fact provided for out of the profits of the undertaking.

Before I turn to the agreements, one further observation falls to be made. A study of the order constituting the J.E.A. shows that it is contemplated that the J.E.A. may acquire by agreement—presumably F on purchase terms—any generating station within its area (cl. 12 of the scheme scheduled to the order). It is also contemplated (cl. 21 of the scheme) that the J.E.A. may agree with the owners of a generating station to take a supply of electricity from the station or to have the use of the station. There are also provisions enabling the J.E.A. to supply G electricity in bulk to undertakers within the area. It does not, however, appear that any power is conferred on the J.E.A. to make capital payments to any undertaking as compensation for their stations or generating plant being sterilised by reason of the reorganisation of supply effected by the J.E.A. It would seem to follow that, if the J.E.A. is desirous H of inducing an undertaker owning a non-selected station to accept a bulk supply (thus in effect sterilising his station) instead of applying to the commissioners for permission to extend his station (an application which the J.E.A. has agreed with the board to defeat if possible), the only effective weapon available to the J.E.A. for effecting its purpose would be its power to offer to charge such favourable rates for the bulk supply as will induce the undertaker to accept its proposals. It is obvious that where, as must almost necessarily be the case, the undertaker has unamortised capital liabilities on his shoulders, he will not agree to any rate for the bulk supply which will not leave him with a balance, out of the charges he collects from his customers, of sufficient size to make satisfactory provision for the amortisation of his capital liabilities.

With this appreciation of the relative situations in 1932 and 1933 of the J.E.A. and the two undertakers, the Reigate Corporation and the Woking company, it becomes necessary to consider the two relevant agreements with the J.E.A. It will be convenient to consider the Reigate agreement first, and then to examine such differences as there are between the Reigate agreement and the Woking agreement.

The Reigate agreement, dated May 20, 1932, is made between the J.E.A. of the one part and the Reigate Corporation of the other part. It is retrospective, and in effect operates from Oct. 1, 1930, for 21 years certain and is to continue thereafter from year to year until terminated by either party. During its operation the J.E.A. is to supply to the corporation all the electricity required by the corporation, but, until the necessary transmission line is completed by the board so as to enable the board to supply electricity to the authority (for delivery, of course, to the corporation) at the corporation's station, the corporation is to ask the authority only for as much electricity as can be produced at the corporation's own station. The purport of this provision becomes clearer when it is realised that, under subsequent provisions, the corporation is, as from the commencing date of Oct. 1, 1930, to be treated as generating electricity at its station as the *alter ego* of the J.E.A. The J.E.A. accordingly through its agent, the corporation, works the generating station, and, having thus generated the electricity, is treated as handing it over to the corporation, which distributes it on its own account. This rather artificial arrangement seems to be aimed merely at enabling the accounts for payment to be worked out in what is apparently regarded as the most convenient way. During this transitional period, while the station is being thus worked, the corporation is to take free the electricity used for the purpose of the working of the auxiliary plant at, and the lighting of, the generating station, but is to pay for all the rest of the electricity which is thus generated at the station and available to it for distribution to its customers.

During at least the first 7 years and 3 months from Oct. 1, 1930 (and the assessments with which this case is concerned relate to years which fall within that period), the financial arrangements operating between the J.E.A. and the corporation are to be as follows. (1) The J.E.A. is to pay the corporation for generating electricity for the J.E.A. at the corporation's station as the agent of the J.E.A. certain sums detailed in Sched. I, Part I. These sums are to be calculated in a very complicated way, the complication being due partly to the fact that provision has to be made for a broken period of a quarter of a year from Oct. 1, 1930, to Dec. 31, 1930, and partly to the fact that (for the benefit, of course, of the corporation) a minimum sum of £1,940 per annum is fixed for what are described as operating costs. The material point for the present purpose, however, is that the payment to be made is to be such as to cover in substance true operating costs, and also the amount A required to meet the charges of amortising their existing capital expenditure. The amount so required for amortisation in each year (beginning 1930) is stated specifically in cl. 4 of this part of the schedule. (2) The provisions thus summarised having dealt with the payment to be made by the J.E.A. to the corporation for the generation of electricity for the B J.E.A. at the corporation's station, it remains to provide for the payment to be made by the corporation to the J.E.A. for electricity sold during the period by the J.E.A. to the corporation, including, of course, the electricity generated elsewhere and supplied in bulk by the J.E.A. as well as the electricity generated at the corporation's station by the C corporation as agents for the J.E.A. This price is composed of a maximum demand charge (in other words, a flat rate based on the maximum demand) and a unit charge varying according to the price of fuel and so forth. Arrangements are made (cl. 11e) for a set-off of cross-demands. There is a special provision in the last paragraph of Sched. II, D Part I, the effect of which is that, if, in any year of supply, the price to be paid by the corporation for the electricity would, on these calculations, fall below the sum required to be paid by the J.E.A. to the corporation to meet the capital amortisation charges, the price paid by the corporation must be made up to the latter sum. The result E plainly appears to be that, however the relative proportions of the electricity generated at the station and the electricity supplied from outside may vary, one thing at all events is not to happen. In no event is the J.E.A. to be called upon to supply funds to meet the corporation's amortisation charges unless it receives from the corporation a F sum less than the amount required for amortisation. In other words, amortisation charges will always be borne by the corporation, which can, of course, bear them only out of the profit balance which will remain after the net moneys it has to pay out for its electricity have been deducted from the charges which it collects from its consumers.

G This survey enables the problem propounded in the case to be formulated in intelligible terms. The Crown contend that the agreement is a mere price-fixing agreement, and that under it the net amount which the corporation has to disburse for the acquisition of the electricity which it is to sell to its consumers is ascertained, the net amount being reached H by a set-off of the figures of credit by the J.E.A. to the corporation under Part I of the schedule for generating electricity in its own station as agent for the J.E.A. against the debit by the J.E.A. against the corporation under Part II of the schedule. The corporation, on the other hand, contend that the agreement falls into two parts, and that in one part it provides for a price, as set out in Sched. II, to be paid by the corporation to the J.E.A. for electricity, while in the other part it provides for a payment, as set out in Sched. I, of a capital nature, to be paid by the J.E.A. to the corporation, either as an inducement to it to enter into the agreement or as a *quid pro quo* for the loss it will incur by the contemplated sterilisation of its generating station. Emphasis was laid on the headings of the schedules, that of Sched. II referring to " price " and that of Sched. I to " amount," and the court was taken in detail through a number of provisions relating to the ingredients which go to making up the price and amount respectively, and it was suggested that the only connection between the " amount " to be paid by the J.E.A. to the corporation and the "price" to be paid by the corporation to the J.E.A. was to be found in the fact that, for obvious convenience, they were to be set off in account. It is true that the language employed is not throughout very apt, but we can feel no doubt that the " amount " in Sched. I is calculated merely as an item to go in reduction of the all-round price fixed under Sched. II in view of the fact that the price had to be so adjusted as to leave the corporation with sufficient balance of the charges collected from its customers over the net price payable to the J.E.A. to enable it to meet, not only the costs incurred in generating such electricity as was to be generated in the station, but also its amortisation charges.

It is necessary now to turn to the Woking agreement in order to ascertain whether it differs from the Reigate agreement in any particular which would justify some conclusion on its construction differing from the conclusion reached on the Reigate agreement. Counsel for the Woking company agreed that the distinctions were to be found in two matters, the first being in the difference of wording between the heading of the first part of Sched. I in the two agreements. The Reigate heading runs as follows :

> The amount to be paid by the authority to the council for electricity agreed to be supplied and delivered by the council to the authority during each year of supply under cl. 3 of the foregoing agreement.

The Woking heading runs as follows :

> The amount to be paid by the authority to the company during each year of supply until the exercise by the company of their option under cl. 3 (*a*) of the foregoing agreement shall be calculated as follows . . .

There seems to be no difference in this distinction. The calculations refer in both cases to the initial period of 7 years, extensible as mentioned in each agreement. It seems fantastic to build any argument on the unimportant difference of wording. The second distinction suggested by counsel was based on a comparison of the respective clauses marked cl. 6 (*e*) in the two agreements. This distinction seems plainly to be unimportant on the general question of construction. It is true that in the Woking agreement the details are different, that the allowance which assists towards meeting the amortisation expenses is spoken of specifically as " repaid " by the J.E.A., and that the method of adjusting the allowance based on amortisation expenses is also in effect to be varied according to certain contingencies. These differences in detail are quite insufficient to override the conclusions on the construction of the whole document which have already been indicated.

From what has already been said, it appears that, as a matter of construction, we are unable to accept the view of the commissioners that the so-called receipts by the respective undertakers under the calculations made in the respective first schedules are compensation for the loss by them of the generating sides of their undertakings. The net amount paid in each period by the undertaker to the J.E.A., after setting off the cross-payment by the J.E.A. to the undertaker, is, in our judgment, a trading liability of the undertaker in its business of obtaining and distributing electricity. That net amount will, of course, be allowed as a debit item against the undertaker's receipts from its customers for the purpose of ascertaining its profits, and, the greater the cross-credit given by the J.E.A. to the undertaker, the less, of course, will that net amount be, and the greater the profit. The amortisation expenses will be borne, in fact, out of the profit when earned. To put it in another way, tax will be paid upon so much of the profit as is applied for amortisation. That, however, will merely continue the position as it stood before the arrangements made in 1932 and 1933. The truth is that the Crown must necessarily succeed in its claim unless the undertakers can establish that the effect of the change in 1932 and 1933 was to place on the J.E.A. the right and the duty to provide a capital sum to be paid as a capital sum to each undertaker to be spent by him as such in liquidating his amortisation burden. We venture to think that a study of the documents makes it quite clear that, on the contrary, it was intended that amortisation should continue to be effected as before out of profits, each undertaker's disbursements for procuring current being so adjusted as to provide electricity for him at a rate which would leave him in no worse a position, but rather in a better position for obtaining sufficient profits by sale to his customers to cover his trading liabilities and which would leave enough for amortisation out of the balance of profit.

The judge took the same view as the commissioners—namely, that the scheme involved the provision of a capital sum to be used as a capital sum to provide the amortisation of the sterilised capital. We have already explained the reasons which, in our judgment, make it impossible for us to accept this view.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Lees & Co.*, agents for *Heber Davies*, Town Clerk, Reigate (for the Reigate Corporation); *Sydney Morse & Co.* (for the Woking Electric Supply Co., Ltd.).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CHAPPELL *v.* RUNDLE.

[King's Bench Division (Viscount Caldecote, L.C.J., and Tucker, J.), **July 16, 1941.**]

Emergency Legislation—Destruction of rats—Person using land—Contractor threshing corn—Rats Order (No. 2), 1940 (*S.R. & O.*, 1940, *No.* 1557), *arts.* 1, 2, 6).

The respondent was the owner of a threshing machine and he agreed with a farmer who had a rick of corn on his land ready for threshing to supply the machine, superintend the operation of threshing and to supply the services of a mechanic. The farmer provided the other six or seven men needed for the threshing. The Rats Order (No. 2), 1940, requires the person using the land for threshing to erect around the rick a fence impenetrable by rats and it was contended that the respondent, and not the farmer, was the person so using the land. The justices found on the evidence that the farmer was the person so using the land within the meaning of the order :—

Held : it was not possible to say that the justices had come to a wrong conclusion.

[**EDITORIAL NOTE.** The order here considered places the responsibility of erecting the fence upon the person using the land. As the general practice is for farmers to engage a contractor to do their threshing, the terms of the order do not make it clear whether the responsibility for erecting the fence rests with the farmer or the contractor. The decision, so far as it goes, places the responsibility on the farmer.

As to Threshing Machines, see HALSBURY, Hailsham Edn., Vol. 1, pp. 430, 431, para. 736. See BUTTERWORTHS EMERGENCY LEGISLATION, [1] 40]

Case Stated by justices sitting as a court of summary jurisdiction at Horncastle. The appellant, an inspector of police, had alleged that the respondent, Rundle, on Dec. 12, 1940, had failed, before beginning to thresh a rick of corn, to cause it to be completely surrounded by a fence impenetrable by rats escaping from the rick, contrary to the Rats Order (No. 2), 1940. That order provides as follows :

1. This order relates to agricultural land used for the purpose of threshing any corn.
2. Every person who uses any such land as aforesaid for the purpose aforesaid shall before the commencement of the operation of threshing any rick of corn cause such rick to be completely surrounded by a fence not less than 30ins. high constructed of material sufficiently impenetrable by rats escaping from the rick to enable them to be killed inside the fence. If the material is wire netting, the mesh of the wire shall not be greater than ½in.
6. Every person who occupies such land shall take effective steps to destroy the rats escaping from any rick.

Rundle was a threshing contractor. On Dec. 12, 1940, a machine belonging to him was standing on agricultural land for the purpose of threshing a rick of corn belonging to Edward Coney, the farmer occupying the land. Rundle was superintending the threshing assisted by one of his own men and six or seven others employed by Coney. By a verbal agreement between Rundle and Coney, Rundle undertook to superintend the threshing and to provide the necessary machinery and the services of a mechanic.

On these facts, it was contended that Rundle was using agricultural land for the purpose of threshing corn within the meaning of the Rats Order (No. 2), 1940, that there was a distinction between the person using the land for the purpose of threshing corn and the farmer who occupied the land and that Rundle was an independent contractor in charge of the threshing operation and, therefore, responsible for the erection of the fence.

The justices were of opinion that, on the evidence, the person A using the land within the meaning of the order was the farmer occupying the land and not the respondent.

The inspector of police appealed.

W. J. K. Diplock (for *Hubert Hull* on war service) for the appellant.

Gerald Gardiner for the respondent.

B *Diplock:* Both the farmer and the contractor may be said to be using the land. *Prima facie,* "using" has a very wide meaning, and will include anyone using the land for his business. The contractor is not a mere servant. He supplies the machinery and has control of the operations. It is not necessary to show that the respondent was an independent C contractor. It is sufficient if the respondent used the land.

Gardiner: By reg. 6, it is the occupier who has to prevent the rats from escaping from the rick. A person does not "use" land for the purpose of threshing. The respondent is not an independent contractor, for six out of seven of the men on the job were the farmer's employees. D On the evidence the magistrates came to the correct conclusion.

VISCOUNT CALDECOTE, L.C.J.: The respondent had undertaken to superintend the operation of threshing the rick, to provide the machinery, and to provide the services of a mechanic to work the machinery. At E the time when this particular threshing operation was being carried out, the respondent was himself working upon the machine and superintending the operation. In those circumstances, the magistrates have found that the person who was using the land was the occupier of the land—in ordinary language, the farmer—and that the respondent was not using the F land. In my view, it is not possible for us to say that the magistrates were wrong in coming to that conclusion. The facts of this case are, or may be, different from those in other cases, and it may be that, if a farmer, to take the illustration which was suggested in the course of the argument, called in a man to carry out the work of threshing the stack G and left him to supply the labour and the machine to do it, in such a case the person using the land would be the contractor. However, I express no opinion about that. The magistrates have come to the conclusion that, on the facts of this case, the man who supplied the machine was not using the land, and that is a finding which, in my view, we cannot H disturb. The appeal must be dismissed.

TUCKER, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Taylor, Jelf & Co.*, agents for *Eric Scorer*, Lincoln (for the appellant); *Joynson-Hicks & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

YORKSHIRE DALE STEAMSHIP CO., LTD. *v.* MINISTER OF WAR TRANSPORT. THE COXWOLD.

[King's Bench Division (Viscount Caldecote, L.C.J.), **July 3, 4, 1941.**]

Insurance—Marine insurance—War risks—Ship in convoy—Stranding.

> The Coxwold was requisitioned and was sailing in convoy. On a night when visibility was poor, the ship, though keeping generally to the course given by the commodore of the convoy, stranded. The arbitrator found as a fact that the stranding was not due to the negligence of those on board and, if and so far as it was a question of fact, that the loss was the direct consequence of the warlike operation on which the ship was engaged. The arbitrator further found that there was an unexpected and unexplained tidal set which carried the ship some miles out of her course, but did not find that that was the direct cause of the stranding:—
>
> Held: the loss was due to the warlike operation on which the vessel was engaged.

[**EDITORIAL NOTE.** This case raised again the question whether a ship in convoy is engaged in a warlike operation. The matter, though touched upon in the previous cases cited herein, has apparently never been expressly decided. The facts of the present case are not well suited for the raising of that question in those bald terms, for, in this case, the ship was taken some miles out of her course by a tidal set. However, there was no express finding by the arbitrator that this was a direct cause of the accident, and the judge has held that the loss of a ship in convoy is not a marine loss but a war risks loss, unless there is some plain intervening cause of the disaster. It cannot be said that everything which happens in the course of a warlike operation is the result of that operation. On the other hand, if the happening of a loss is to be ascribed to some other cause, there must be a definite finding of fact that that other cause was the direct cause of the loss. The remaining point in the case is whether there is any distinction between cases of collision and cases of stranding in this connection. Upon this the judgment expresses no final opinion.

As to Warlike Operations, see HALSBURY, Hailsham Edn., Vol. 18, pp. 316, 317, para. 441; and for Cases, see DIGEST, Vol. 29, pp. 226-230, Nos. 1836-1861.]

Cases referred to:

(1) *Commonwealth Shipping Representative* v. *Peninsular & Oriental Branch Service*, [1923] A.C. 191; 29 Digest 226, *1838*; 92 L.J.K.B. 142.

(2) *Clan Line Steamers, Ltd.* v. *Board of Trade, The Clan Matheson*, [1929] A.C. 514; Digest Supp.; 98 L.J.K.B. 408; 141 L.T. 275.

(3) *A.-G.* v. *Ard Coasters, Ltd., Liverpool & London War Risks Insurance Assocn., Ltd.* v. *S.S. Richard De Larrinaga Marine Underwriters*, [1921] 2 A.C. 141; 29 Digest 228, *1851*; 91 L.J.K.B. 31; 125 L.T. 548.

(4) *Britain S.S. Co.* v. *R., Green* v. *British India Steam Navigation Co., British India Steam Navigation Co.* v. *Liverpool & London War Risks Insurance Assocn.*, [1921] 1 A.C. 99; 29 Digest 230, *1860*; 89 L.J.K.B. 881; 123 L.T. 721.

(5) *A.-G.* v. *Adelaide S.S. Co.*, [1923] A.C. 292; 29 Digest 228, *1850*; 92 L.J.K.B. 537; *sub nom. Adelaide S.S. Co.* v. *R.*, 129 L.T. 161.

(6) *Board of Trade* v. *Hain S.S. Co.*, [1929] A.C. 534; Digest Supp.; 98 L.J.K.B. 625; 141 L.T. 435.

Case Stated by an arbitrator for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Cyril T. Miller* for the Minister of War Transport.

Owen Bateson for the assured.

A VISCOUNT CALDECOTE, L.C.J.: This is an award stated in the form of a special case on a question of the insurance of a requisitioned ship, the Coxwold, the question being whether it is a marine risk or a war risk. The Coxwold is a motor-ship, and she was requisitioned in Sept., 1939, on the terms of a charterparty form T. 99 A., together with form T. 773, B which last-mentioned form contained the conditions relating to war risk liability, or war risk insurance. Those terms are in the familiar form. The risks of war which are taken by the charterer are risks which would be excluded by an ordinary marine policy by the f. c. & s. clause. Then there is an additional paragraph which says that the risks of war taken by the C charterer are loss of, or damage to, the ship caused by hostilities, warlike operations, and so on, but I am inclined to think that, as the Solicitor-General said, that adds nothing.

The ship, having been requisitioned, was running on the terms of the charter on May 6, 7, 1940. She was proceeding in convoy under the usual D conditions—namely, no navigation lights, except a shaded stern light. Other vessels were with her, all of them on a course ordered by the commodore of the convoy, and at times zigzagging in accordance with the orders of the commodore. The night was not very clear. The arbitrator finds that at any rate from 2.30 a.m. there was a heavy rain squall and that E visibility was poor. The Coxwold lost the convoy at one point, but she kept more or less on the course which had been ordered, north-east by north. Subsequently she changed her course, and then came back to it, passing through some of the other ships of the convoy, which were then on the opposite course for some unknown reason. Eventually she F stranded on the Isle of Skye, not having apparently observed her position by reference to a light rather north of the place where she stranded. The arbitrator finds that there was an unexpected and unexplained tidal set which carried the Coxwold some miles to the eastward. He also found that the ship was unable to get a clear view of the Neist light, the light G to which I have just referred. The result of all those facts was that the Coxwold stranded and her owners now claim indemnity from the Minister of War Transport.

The findings of the arbitrator include a finding in para. 6 that there was no improper navigation of the Coxwold and that her stranding was H not due to negligence of those on board. Then in para. 9 he says:

> If and so far as it is a question of fact, I find that in the above circumstances the loss in question was the direct consequence of the warlike operation on which the Coxwold was engaged.

Some question arose as to whether that ought to be treated as a finding of fact which could not be disturbed unless there was no evidence to support it, but, if one looks at the familiar cases on questions of this sort, one sees that a finding to this effect has always been treated as a question of law, which is open to review. That was so in *Commonwealth Shipping Representative* v. *Peninsular & Oriental Branch Service* (1), *Clan Line Steamers, Ltd.* v. *Board of Trade, The Clan Matheson* (2), and again in *A.-G.* v. *Ard Coasters, Ltd.* (3). In some cases the award of the arbitrator was disturbed, and in one case it was affirmed, but the question was always discussed and dealt with as one for the court to determine as a question of law or as a question of law and fact.

In this case, in para. 11 of his award, the arbitrator says:

> The question for the decision of the court is whether, upon the true construction of the terms of the said charterparty and Form T. 773 and upon the facts found by me, the claimants are entitled to recover against the respondent for the loss sustained in respect of the stranding of the Coxwold.

Counsel for the assured, the shipowners, cannot succeed unless he can show that the loss was proximately caused by a peril insured against. That is the effect of the Marine Insurance Act, 1906, s. 55. I have used the expression " unless he can show " that the stranding was due to a warlike operation, because, if one looks at some of the cases, it will be found that that is repeatedly stated to be the position. In *Britain S.S. Co.* v. *R.* (4), Lord Atkinson said, at p. 119:

> The loss of a ship by striking or grounding on rocks is, as I have said, *prima facie* a marine risk. The burden of proving that it is, in this case, a war risk rests upon the owners of the Matiana, or on the underwriters under the marine policy. The question for decision resolves itself I think into this: Has that burden been discharged by the evidence given in the case ?

There Lord Atkinson is dealing with the question whether or not it was a war risk. In *A.-G.* v. *Adelaide S.S. Co.* (5), Lord Sumner said, at p. 305:

> When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy . . .

I think that here it must be taken, as I have said, that the ship must prove, or show, that the damage was the proximate result, or was proximately caused, by the warlike operation. Otherwise, it is a marine risk.

Counsel for the assured relied upon the fact that this ship was admittedly engaged in a warlike operation. That is stated in para. 4 of the award, as the result of an admission by the respondent. Counsel cited *A.-G.* v. *Adelaide S.S. Co.* (5) as justifying his proposition that the fact that the ship was engaged in a warlike operation, and, in being so engaged, suffered damage, is a necessary finding that the damage was proximately caused by the warlike operation. The first question is whether *A.-G.* v. *Adelaide S.S. Co.* (5) is direct authority, if it is an authority at all, for that proposition. That is a very wide, but a very simple, proposition. Once counsel for the assured says that there is a warlike operation, every mishap in the operation is a war risk. In *A.-G.* v. *Adelaide S.S. Co.* (5), the Warilda was on a warlike operation, and she was found to be negligent. It is interesting to notice that in that case the only argument which was presented was that the collision was proximately caused by negligence, and, therefore, that it was not a war risk result. The House of Lords said that negligence was not the cause of the collision. The question of negligence being the only point argued by the Crown, it must have been assumed that the collision was due to the warlike operation, without very much more argument. In that case, Viscount Cave, L.C., dealing first of all with the question of negligence, said, at p. 298 :

> The operation may have been negligently conducted so far as the safety of other vessels was concerned, but the same may be said of many other warlike operations. The negligence of the master may have contributed to the loss ; but its dominant and effective cause was the operation in which the vessel was engaged, and the liability therefore attaches.

Then Lord Shaw said, at p. 300 :

> Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations.

Then Lord Sumner said, at p. 301 :

> By admission the Warilda's operation was a warlike operation throughout, and as was the whole so were the parts. Steaming into the Petingaudet was one of those parts, and none the less so, whether it was due to mere misfortune, to error of judgment, or to negligent navigation. Had it been done wilfully the case might be different.

It certainly seems to me that, as a result of those observations, there is some ground for saying that, once you get a ship on a warlike operation, unless there is some other plain intervening cause, such as a collision wilfully brought about, the damage caused in the course of the execution of a warlike operation is proximately caused by that warlike operation. I have read the passage from the opinion of Lord Sumner in which he said that, if the collision had been wilfully caused, it would have been another matter. Then Lord Sumner a little later said, at p. 305 :

> When damage is done by two ships coming into collision, one being engaged in a warlike operation and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy . . .

In the light of that statement, it seems that, if a collision between a commercial ship and a ship on a warlike operation takes place and the collision is caused by the action of the officer in charge of the commercial ship, the proof that it is the result of a warlike operation seems to fail. However, I think that it is necessary to look a little further at *A.-G.* v. *Adelaide S.S. Co.* (5) to see whether the proposition that damage caused in the course of a warlike operation is proximately caused by that operation is justified. The familiar cases in regard to the matter have been brought once more to my attention. In *A.-G.* v. *Ard Coasters, Ltd.* (3), damage to the other ship—that is to say, damage to the Richard de Larrinaga—was almost assumed to be the direct result of the warlike operation being conducted by the Devonshire. It was said in that case that the Richard de Larrinaga was on her course when the collision took place. In *Commonwealth Shipping Representative* v. *Peninsular &*

Oriental Branch Service (1), the Bonvilston was responsible for the collision, and, as it was found that she was on a warlike operation, the collision was held to be proximately caused by that operation. Then in *Board of Trade* v. *Hain S.S. Co.* (6), to which I have not so far referred, LORD BUCKMASTER said, at pp. 538, 539 : A

> The remaining question can be shortly dealt with. This House has decided that, if a vessel is engaged on warlike operations and none the less by its negligence collides with another vessel, the negligence does not prevent the collision being the result of warlike operations . . .

That is not a direct and positive statement to the effect of the contention put forward by counsel for the assured, because LORD BUCKMASTER is B dealing there with the question of negligence preventing the collision from being the result of warlike operations, but it does seem to be assumed by him that, once negligence is out of the way, damage caused in the course of warlike operations is, as I have already said, proximately caused by the warlike operations. C

Then, lastly, comes *Clan Line Steamers, Ltd.* v. *Board of Trade, The Clan Matheson* (2). That case shows that not everything which befalls a ship on warlike operations is proximately caused by those operations. In that case, it was held that the new factor was a breakdown of the ship's steering-gear. All these cases seem to me to support the contention of D counsel for the assured so far, but I am not going to say for a moment that his proposition, if it was stated as widely as I think it was, is sound. It may be enough to carry him home in this case, but I am not going to say that it is true when stated in an unqualified form—namely, that everything which happens in the course of a warlike operation is the result of E that operation. As the Solicitor-General pointed out, if a ship is on warlike operation and a tornado arises and the ship is damaged, it may very well be held that that damage is not a result of a warlike operation, but is a marine risk.

Before I finally come to a conclusion, *Britain S.S. Co.* v. *R.* (4) has to be F dealt with. It seems to me that the whole of the difference, or a large part of the difference, between *Britain S.S. Co.* v. *R.* (4) and the other cases and this case is the fact that in *Britain S.S. Co.* v. *R.* (4) the Matiana was not on a warlike operation. There it was contended that, as she was under the orders of the convoy commodore, she was on a warlike operation, G but it was held that she was not. She was one of the sheep, to use the famous expression of LORD ATKIN, but was not one of the shepherds, and, therefore, the fact that she was under orders did not make the stranding the result of a warlike operation. Therefore, *Britain S.S. Co.* v. *R.* (4) not going, as I understand the cases, contrary to any of the decisions to H which I have previously referred, I think that in this case, subject to one possible further point, this stranding was a result of warlike operations. The question is whether this is one of what I may call the exceptional cases, such as the Solicitor-General mentioned, of a warship on a warlike operation being subjected to a very unusual storm and suffering damage, or such a case as was mentioned in one of the judgments which I have cited, where the damage was really caused by the commercial vessel. The Solicitor-General relies upon a finding in a case which I have already cited, and says that here there was an unexpected and unexplained tidal set which carried the Coxwold to the eastward. In my judgment, that A is not enough to make the ship fail to prove that this was a loss due to the warlike operations. The arbitrator finds that there was a tidal set, but does not find that that was the direct cause of the stranding, and, even if he did find that, I am not sure that that would conclude the case. However, it is not necessary for me to decide that point. The arbitrator merely B finds that it was one of the incidents of this vessel's voyage in convoy, just like the fact that she was unable to get a clear view of the lighthouse, or that she was steaming without navigation lights and was zigzagging.

The Solicitor-General raised an interesting question, which far be it from me to attempt to decide, as to whether *Britain S.S. Co.* v. *R.* (4), the C other stranding case which has been cited, and perhaps one or two other cases, may have been decided in some way on a principle which is not applicable to collision cases. It so happens that *Britain S.S. Co.* v. *R.* (4) is one of the several stranding cases, but the collision cases are much more numerous than the stranding cases. Perhaps it is unnecessary for me to D say so, but I think that it would be wrong to treat the collision cases on any different principle from the stranding cases. If the Coxwold had collided with a stationary ship—it may be a lightship or a ship moored at anchor—the principle to be applied would be precisely the same as if she had stranded, as she did, and, if she had been on a warlike operation, E I think that she would rightly have been held to have suffered damage as a result of the warlike operation. For those reasons, I have come to the conclusion that the arbitrator was right and that the award must stand. I have not attempted to do what the Solicitor-General rather invited me to do—namely, reconcile all these cases. I am, in effect, I will not say F without lights, but, at any rate, with lights which are not always as clear, having regard to their number, as they might be. As I have said, I have reached the conclusion, as a result of a review of the cases which have been called to my attention, that the award of the arbitrator was right and must stand.

G *Award affirmed with costs.*

Solicitors: *Treasury Solicitor* (for the Minister of War Transport); *Holman, Fenwick & Willan* (for the assured).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

H

In the Estate of SPARK.

[Probate, Divorce and Admiralty Division (Hodson, J.), **July 15, 1941.**]

Wills—Soldier's will—Actual military service—Soldier stationed in camp in England—Death in air raid—Wills Act, 1837 (*c.* 26), *s.* 11.

A soldier, a member of the Territorial Army, was mobilised on the outbreak of war in Sept., 1939. While he was stationed at a camp in England and not under orders to proceed abroad, he was injured by a bomb dropped by enemy aircraft and died on the following day, Aug. 8, 1940. On Aug. 5, 1940, while he was in camp, the deceased had said to another soldier: "I wish my wife to have all I have in case I get killed":—

Held: the deceased was in actual military service within the meaning of the Wills Act, 1837, s. 11.

[**EDITORIAL NOTE.** The facts in this case differ from those in *In the Goods of Gibson*, p. 91, *ante* in that the soldier in this case was stationed in camp, whereas in the former case he was living in his own house. The decision, however, does not seem to rest entirely on that distinction. The judgment herein, after considering the authorities at some length, decides that the fact that the soldier is not *inops consilii* is not the decisive factor in determining whether the will is entitled to be admitted to probate as having been made in actual military service. It is found that a soldier stationed in camp is a mark for enemy action and is in actual military service just as if, in the circumstances of earlier wars, he was on foreign service. It is, therefore, held that, in such circumstances, the soldier is engaged with the enemy in the circumstances envisaged by those responsible for the drafting of the Wills Act, 1837. The position is that, while *In the Goods of Gibson, supra*, emphasised the fact that the soldier was not *inops consilii* and was in much the same position as a civilian so far as obtaining professional advice and assistance was concerned, the present decision emphasises the fact that the soldier was *in expeditione*—or, in the judge's own expressive words, a mark for the enemy—and the fact that he had opportunities of obtaining legal assistance did not deprive him of the privileges granted by the Wills Act, 1837, s. 11.

As to Actual Military Service, see HALSBURY, Hailsham Edn., Vol. 14, p. 198, para. 325; and for Cases, see DIGEST, Vol. 39, pp. 333-335, Nos. 193-219.]

Case referred to:

(1) *In the Goods of Hiscock*, [1901] P. 78; 39 Digest 334, *202*; 70 L.J.P. 22; 84 L.T. 61.

Motion by the widow to admit to probate the will of a soldier killed by an enemy bomb while he was in camp in England. The facts are fully set out in the judgment.

Geoffrey C. Tyndale and *C. O. Herd* for the applicant.

Hodson, J.: This is a motion in the estate of John King Spark, deceased, which raises a point of some importance. The deceased was a soldier who died in this country on Aug. 8, 1940, as the result of a mortal wound received on Aug. 7, 1940. He had previously made a statement which is set up as a nuncupative will, and is relied upon as being a privileged will by virtue of the Wills Act, 1837, s. 11, which provides as follows:

> . . . that any soldier being in actual military service . . . may dispose of his personal estate as he might have done before the making of this Act.

The words which I have to consider in connection with the facts of this case are "in actual military service."

The facts are that this soldier was a Territorial, and was accordingly mobilised on Sept. 1, 1939. He saw his solicitor on the same day and gave instructions for his will. His solicitor dealt with the matter promptly, but the soldier never actually executed a will in accordance with the ordinary provisions of the Wills Act, 1837. He said that he would execute it on his next leave, but, although he had further leave, he did not in fact execute it. He spent his leaves with his wife at Walton-on-Thames, his solicitor being at Barnes. His periods of leave were short and he never took the opportunity afforded him of carrying out his intention of executing this will. In Aug., 1940, his battalion was in camp at a spot in Great Britain which it is not necessary for me to identify by name, and on Aug. 5, 1940, while he was in camp, he said to another soldier, a comrade of his: "I wish my wife to have all I have in case I get killed." There is no doubt that those words are sufficient to satisfy the necessary testamentary qualifications of a will, provided that the soldier was in a position to have the benefit of the privilege. On Aug. 7, 1940, enemy aircraft dropped bombs on the camp where this soldier was. One bomb actually fell on the tent in which he was sleeping, and he received a wound from which he died on the following day. Incidentally, before he died, he referred to the will he had declared in favour of his wife.

There are phrases in some of the old cases which lay emphasis on the reason for the soldier's privilege being given, the reason being that a soldier *in expeditione* or in actual military service, is usually *inops consilii*. He has not the opportunity of drawing up a will with the necessary formalities, and has not the opportunity, as a rule, of getting legal advice. Of course, this man had every opportunity of obtaining legal advice, and he was not in any sense *inops consilii*. He was in England, and he was in touch with his solicitor. He had given instructions to his solicitor to prepare his will, and, if he had chosen to spend part of his leave with the solicitor, he could have completed the testamentary act upon which he had started, but he did not do so. However, although it is no doubt true that the basis of the privilege is the fact that a soldier has not, as a rule, got a solicitor at his elbow, nevertheless, to my mind it does not really assist very much in deciding whether a soldier is in actual military service or not, and I see that that aspect of the matter was discussed in *In the Goods of Hiscock* (1), where SIR FRANCIS JEUNE, P., said, at p. 78:

> I quite agree that it is not right to consider, in individual cases, whether the person whose will is in question was *inops* or not; because there might be cases where a man could not be said to have been *inops* but who would yet come within the words of the Act.

Then he goes on to give an illustration of a case of that kind.

I have been referred to a number of cases decided during the last war and during the Boer War, and some older cases, and I have been referred to one decision which was given during this war. Some of the cases which are reported seem to indicate that importance should be attached to the actual orders received by the soldier at a particular moment. For instance, in several cases it was held that a soldier in England during the last war who was under orders to go overseas was in actual military service, the inference being—so far as one can gather, from the somewhat meagre reports, what was in the minds of the judges who were deciding those cases—that, if a soldier had not been under orders to proceed overseas, the court might at any rate have found considerable difficulty in allowing that the privilege would lie.

It is quite clear that in this war the extent of military operations has been very much enlarged, in depth and in height, and circumstances are different now from those which existed in earlier wars. The scope of military operations is very much larger, and it seems to me that a soldier who is in camp (even though he is in England and not under orders to proceed overseas) is thereby a mark for enemy action, and is in a position in which he is in actual military service within the meaning of the section, just as if he were engaged with the enemy in circumstances which no doubt were envisaged by those responsible for the drafting of the Wills Act, 1837.

The soldier in this case, John King Spark, was killed, in circumstances which I have described, by a direct enemy attack made on his camp within a day or two of the statement which he made and which is relied upon. I find that this will, in the form I have stated—namely, " I wish my wife to have all I have in case I get killed "—is entitled to be admitted as having been made on Aug. 5, 1940, by the deceased while a soldier in actual military service.

Will admitted to probate.

Solicitors : *Brooks, Davidson & Bartley* (for the applicant).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

DAWSON *v.* MUREX, LTD.

[KING'S BENCH DIVISION (Hilbery, J.), **July 7, 1941.**]

Factories—Provisions for safety—Lifting tackle—Chain sling—Chains of unequal length—Sprung hooks—Factories Act, 1937 (*c.* 67), *s.* 23 (1) (*a*).

The defendants, for the purpose of loading a furnace for refining raw blister copper, used trays which were hoisted and conveyed from one part of the factory to another by a sling of 4 chains attached to the tray by a hook passing through an eye in a lug at each of the 4 corners of the tray. The men in charge of this work, when such a sling became defective, rigged up a sling out of two others. This sling was defective in that the chains were of unequal length and the hooks were sprung so that they did not hold the trays as tightly as they should. It was used to lift three empty trays, the hooks being passed through the eyes in the lugs of the bottom tray. The top tray slipped out of the sling, fell and injured the plaintiff. The plaintiff claimed that the defendants had committed a breach of the statutory duty imposed upon them by the Factories Act, 1937, s. 23 (1) (*a*), which requires that every chain, rope or lifting tackle shall be free from patent defect :—

HELD : there had been a breach of the statutory duty imposed by the Factories Act, 1937, s. 23 (1) (*a*).

A [**EDITORIAL NOTE.** A word or two is required in explanation of this case. The plaintiff claimed, in addition to the matter here reported, that the employers had failed in their common law duty to provide a competent staff, adequate material and a proper system of work and effective supervision. This claim failed on the facts and no useful purpose would be served by reporting that part of the judgment. There was a defence that the plaintiff had elected to receive workmen's compensation B under the Act, but the evidence failed to support that defence and it was withdrawn. There remains the claim under the Factories Act, 1937, s. 23 (1) (*a*). It may be said that this is a question of fact and would not be of much assistance to or binding upon the court in the consideration of another claim under the same provision of the Act. That may be so, but that is not the object with which such decisions are included. Where the legislature has thought fit to prescribe in general terms C certain duties which factory owners must fulfil, it is essential for those called upon to advise such owners as to their liability under such provisions to be able to refer to decisions where it has been held that such provisions have or have not been complied with. It is only by the consideration of such decisions that the ambit of such statutory provisions or regulations can be ascertained and proper advice given to intending litigants. It is not suggested that such decisions enunciate a body of principles such as those on which the general body of the common law D is based, but they do provide a series of illustrations without which it is impossible for the profession to provide that efficient service which clients have a right to expect. In the present case, the statute, so far as material, merely provides that lifting tackle shall be free from patent defect. The important points in the facts are that a new and, so far as is known, perfect sling was available in the store, and that, in the case of the makeshift sling, apart from the hooks being sprung, E the defect was more in the way the men had arranged its component parts than any defect in the material. It seems clear that, if the men had so arranged the sling that the chains were of equal length, the accident would not have happened and, possibly, there would have been complete compliance with the statutory duty.

AS TO PROVISIONS FOR SECURITY SAFETY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-602, paras. 1130-1144 ; and FOR CASES, see DIGEST, Vol. 44, F pp. 908-912, Nos. 62-84.]

Cases referred to :

(1) *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152 ; [1939] 3 All E.R. 722 ; Digest Supp. ; 108 L.J.K.B. 779 ; 161 L.T. 374.

(2) *Stimpson* v. *Standard Telephones & Cables, Ltd.*, [1940] 1 K.B. 342 ; [1939] 4 All E.R. 225 ; Digest Supp. ; 109 L.J.K.B. 315 ; 161 L.T. 387 ; 36 G B.W.C.C. 253.

ACTION for damages for breach of the statutory duty imposed upon the defendants by the Factories Act, 1937, s. 23 (1) (*a*).

On Monday, June 17, 1940, shortly before 8 a.m., the plaintiff, then a H maintenance electrician in the employment of the defendant company, in the course of his employment stepped through a doorway into a part of the defendant company's premises known as the copper plant. Walking with him was another workman of the defendant company. Almost immediately after the plaintiff and his fellow-workman had thus entered the copper plant, they were both struck down, and the plaintiff received injuries, while his companion was killed. The plaintiff alleges that his injuries and damage were the consequence of a breach by the defendants of the Factories Act, 1937, s. 23 (1) (*a*), which provides as follows :

> (1) The following provisions shall be complied with as respects every chain, rope or lifting tackle used for the purpose of raising or lowering persons, goods or materials : (*a*) no chain, rope or lifting tackle shall be used unless it is of good construction, sound material, adequate strength and free from patent defect . . .

The copper plant at the defendants' works was erected in 1939 for refining raw blister copper. The furnace, which is cylindrical in shape, stands on the floor, and is so mounted as to be capable of being tilted up to an angle of 75° to be fed with the raw blister copper. There is a platform at a height which is sufficient to come just above the level of the lip of the mouth of the furnace when tilted up to receive its charge. Round the front and one side of this platform runs a double guard hand-rail with posts at intervals, and at the side ,where the staircase leads down to the floor of the shop, there was, at the time of the accident, and had been for some time previously, a single rail on uprights approximately one-half the height of the double guard hand-rail on the front of the platform. There is an overhead crane capable of moving to and fro along the whole length of the shop, with a suspended cab for the crane-driver on the side of the shop opposite the platform. Copper blister, which is to be fed into the furnace after being stored in the field outside, is brought into the shop on trays, which are pushed into the shop on bogies. These trays, which measure about 5ft. by 2ft., are of solid iron with low sides, and have fixed on their sides at each of the four corners a lug with an eye in it, through which a hook can be passed for the purpose of hoisting the tray. Each loaded tray has to be lifted by the crane and carried on to the platform for loading into the furnace. For this purpose, the defendant company provided a 4-chain sling, with a hook at the end of each chain for inserting in the lugs of the trays. The 4 chains of the sling, which were as nearly as possible of exactly the same length, were fastened at the upper ends opposite the hooks to a single ring which passed through their end links, and this ring was placed over the large hook at the end of the hoisting and lowering rope of the crane.

In order to load the furnace the system employed was as follows. A loaded tray was lifted, after the 4 hooks of the sling had been placed in the lugs of the tray. The crane first took the load and lifted it, then moved towards the platform and carried the loaded tray over the staircase on that side of the platform and stopped at the position where the tray was required, where it lowered the tray on to the platform. The lowered tray being thus placed on the platform, and the chains of the sling, therefore, being slack, the hooks of the sling were removed from the tray, when the sling was again hauled up and taken by the crane back to the end of the shop, there to be lowered to repeat the operation. When enough loaded trays were on the platform to supply a full charge for the furnace, and when the furnace was ready to receive it, the furnace was tilted and each loaded tray was in turn brought by means of the crane and sling to a position such that one open end of the tray was presented to the open mouth of the furnace. The two hooks were then removed from the two lugs at the end of the tray nearer to the furnace, and the crane then hoisted the sling, the other two chains and hooks of which were still A holding the other end of the tray, with the result that this end of the tray tilted up, shooting the contents of the tray into the furnace. After the tray had been thus emptied, the two chains and hooks were again fastened to the front end, so that the tray was again slung by all four corners, and the empty tray was carried to the end of the platform ready to be carried B with other empty trays and returned to the floor of the shop. The empty trays were removed from the platform three at a time. As they were of exactly the same size, in order to carry three at a time, the second tray was generally placed on top of the bottom or first tray so that one side stood resting on the tops of the lugs on one side of the bottom C tray, while the other side rested on the bottom of the first tray on the opposite side of it. A third tray was then placed on the second tray, similarly resting on the tops of the lugs on one side and on the other side resting against the inner side of the lugs of the second tray. The four hooks of the sling were then put into the lugs at the four corners of D the bottom tray, the loader holding the slack chains together to keep the hooks in the lugs while the crane took the strain of the load on the hoist. As the strain of the load was taken by the hoist, the loader let go the chains and the load settled into position. The crane-man, being given the signal by the loader, then lifted and carried the load E from the platform over the rail at the side and over the staircase down to the end of the shop, and there lowered it to the floor.

No one saw the accident to the plaintiff, but it was accepted by the defendants that, while three empty trays were being taken from the platform by the crane, the top empty tray slipped out of the sling and F struck the plaintiff and his companion. It was proved and conceded that, at the time of the accident, the ordinary 4-chain sling provided by the defendant company was not in use, but that in its place two slings were being used, adapted so as to be usable as one 4-chain sling. One of these two slings was the 4-chain sling ordinarily used, one leg of which G had had the hook broken, rendering that leg unusable, and thus leaving only three usable legs. The other was a much heavier 3-chain sling with larger chains and hooks, the chains of which were longer, and one leg of which was useless, again because the hook upon it was broken. The two usable legs of the heavier sling had been shortened by tying a H knot in each of them so as to make them of approximately the same length as the legs of the other sling. By these means, and by the combination of the remains of these two slings, five legs and hooks, not in fact of the same length, were available for use as one 4-chain sling, and were so being used. It was also proved that a new 4-chain sling was available in the store and that the men could have obtained it for use instead of rigging up the make shift sling as they did.

F. A. Sellers, K.C., and *John Thompson* for the plaintiff.

G. Russell Vick, K.C., and *R. Marven Everett* for the defendants.

Hilbery, J.: Whether or not the plaintiff has established a case of breach by the defendant company of the requirements of the Factories Act, 1937, s. 23 (1) (*a*), depends on these considerations. The breach of statutory duty is such a cause of the accident as entitles the plaintiff to succeed if the evidence establishes (i) that the make shift sling was a chain, rope or lifting tackle for the purpose of raising or lifting goods or materials, (ii) that it was not of good construction, sound material, adequate strength and free from patent defect, and (iii) that the breach of statutory duty was causally associated with the plaintiff's accident, or, in other words, that, without the breach of statutory duty relied on and proved, the plaintiff would not have met with his accident. The first of these three steps, that which I have called (i), is not in dispute. The makeshift sling, it is conceded, was lifting tackle for the raising and lowering of goods within the meaning of that expression in the section. Step (ii) is a question of fact and inference from facts. I have no doubt on the evidence that the makeshift sling, considered as a sling, contravened the section, and was not free from patent defect. In the first place, the two slings of which the makeshift sling was composed cannot, I think, in the circumstances of this case, be considered separately, for one was not being used apart from the other as a lifting tackle, but such parts of each of them as remained usable were being used in combination as one complete lifting tackle. It is therefore, in their combined use as parts of one whole that I consider them to see whether, on the evidence, they complied with the statute.

On the evidence, I am satisfied that there was such a difference in length of the chains as amounted to a patent defect. The combination of the two slings gave five chains and hooks where four only were required so that there was a number of combinations of four hooks and chains which might be in use for any particular load. Wallace, the engineer for the plaintiff, told me that with the best combination there would be a difference of 3 ins. between the longest and shortest, and that with another combination there might be as much as 3½ ins. difference. I am satisfied, having heard him, that the result of this might be that, if the longest chain went slack, as it would have to do when the three shorter ones took the weight of the load, it might drop its hook out of its lug, leaving a three-point suspension only of a load of trays. Wallace's evidence further satisfies me that, with the exception of one of them, all the hooks were opened or sprung to some extent. The sling, therefore, as a sling in these respects exhibited patent defects. Moreover, though I do not think that it had any bearing on the accident which happened, the knotting of the chains was bad practice, and the presence of the knots was another patent defect. A sprung or open hook, however, is a defect which enables that hook to come out of its lug more easily than it would

if it had no more than its normal opening. In combination with such considerable differences in the lengths of the chains as there were in this makeshift sling, sprung hooks were additionally likely to come out of the lugs. The makeshift sling did not, therefore, satisfy the requirements of
A the Factories Act, 1937, s. 23 (1) (*a*).

There remains for consideration step (iii)—namely, whether on the evidence, it is proved that this breach of the statutory duty owed by the defendant company was causally associated with the plaintiff's accident. The defendant company had much evidence to show that experimentally
B it was not possible to get a tray to slip out of this sling, but whether or not the experts acting for the defendant company in the conduct of the experiments ever succeeded in actually having a load lifted and carried in exactly the same circumstances in every respect as those in which the load was being carried when the tray slipped out and fell on the plaintiff was
C not—and, in the state of the evidence, could not be—established beyond doubt. The premise necessary, if the result of the experiments is to be regarded as a safe guide, is thus lacking, while the fact remains that the tray, while being carried in the sling, did in fact fall out. There was no direct evidence of careless loading on the occasion in question. The
D loader was not called to give evidence, nor was any witness called who saw the loading of the load from which the tray fell. There was no direct evidence of any careless mismanagement of the load by the crane-driver.

Unfortunately neither side called the crane-driver to give his account, but, when the witness Blenkinsop was under cross-examination, counsel for
E the plaintiff cross-examined him about the evidence given by the crane-driver upon oath before the coroner, taking the witness through this evidence and obtaining from him an admission that, after making all the inquiries which he did make, he did not differ from this account of what occurred. Since the witness had not himself seen the occurrence,
F and could only check the crane-driver's evidence by what he had been told by others, whatever that was and however it was obtained, I find his acceptance of what appears on the coroner's deposition as being the account given in evidence before the coroner by the crane-driver of little value, and it does not carry me any further. In face of the other evidence
G called by the defendant company, it seems to be obvious that the witness Blenkinsop should not be regarded as making an admission binding the company that the deposition of the crane-driver contained a statement of fact to be treated as agreed. Whether, if the crane-driver had been called before me and examined and cross-examined, he would have given the
H same account, or, if he had given the same account, he would have adhered to it in every particular under cross-examination, I do not know, nor, without having heard him examined and cross-examined, do I know whether I should have accepted his account as accurate. The deposition may or may not accurately summarise what he said before the coroners Anyone with experience of courts knows that depositions do not alway, manage to reproduce a witness's evidence with accuracy, and many

witnesses standing in the strange surroundings of a witness-box lack the mental alertness and cool presence of mind required to detect instantly the difference between the wording of the deposition and their evidence and to demand and supply the necessary amendments when the deposition is read over to them. For the purpose, therefore, of deciding this case, A I get little or no reliable help from the deposition of the crane-driver, all obliquely introduced into the evidence before me in the way I have described.

Treating the matter, then, as one in which there is no direct evidence of how the load was either loaded or carried, and no direct evidence that the B accident was produced by mishandling of the load, what is the inference to be drawn from the facts which are known ? There is no evidence of any departure on the occasion in question from the normal method of packing, lifting and carrying the load. The first reasonable inference, therefore, is that the normal method of packing and carrying was being used when C the accident happened. This method had never previously been attended by the slipping out of a tray in the course of its carriage, but this normal method had been employed until the Friday night before the plaintiff's accident in conjunction with the use of the proper 4-chain sling and hooks provided by the defendant company. Therefore, as long as the D normal method of packing and carrying was employed with a proper sling, with chains of the same length, and hooks which were unsprung, no tray ever slipped out. With the same method of packing and carrying and an improper sling, with chains of different lengths and several hooks more or less sprung, a tray did slip out. Additionally, there is the opinion E of one expert that the defects in the sling which lead me to call it an improper sling were such as could result in the top one of the three trays being able to slip out. The inference *prima facie*, therefore, is that, but for the use on this occasion of the improper sling, the accident would not have happened. Step (iii), the third and last step necessary for the F plaintiff's cause of action for breach of statutory duty, is, therefore, established, since the inference is that, without the breach of statutory duty, the accident would not have happened.

The plaintiff, therefore, succeeds, provided that, in stating step (iii) as I have, I have rightly interpreted the law. That it is a correct summary G of how the law now stands is, I think, demonstrable by reference to statements made in the House of Lords and the Court of Appeal in two recent decisions. I refer to *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* (1) and *Stimpson* v. *Standard Telephones & Cables, Ltd.* (2).

Judgment for the plaintiff for £1,250 *with costs, credit to be given for* H *amounts paid, though not received, under the Workmen's Compensation Act,* 1925.

Solicitors : *Rowley, Ashworth & Co.* (for the plaintiff) ; *E. P. Rugg & Co.* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

WYLES *v.* BANFIELD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Tucker, J.), **July 17, 1941.**]

Emergency Legislation—Motor vehicle—Immobilisation—Civil defence vehicle—Private car used partly for civil defence purposes—Motor Vehicles (Control) Order, 1940 (*S.R. & O.*, 1940, *No.* 1055), *art.* 1 (1), (3).

When an A.R.P. warden on duty is using his own car partly for his own convenience and leaves it unattended, and not immobilised, as the Motor Vehicles (Control) Order, 1940, directs, it is a question of fact for the tribunal, if he is charged with a breach of the order, whether the car was, at the time of the breach of the order, being used as a civil defence vehicle within the exception contained in art. 1 (3), and it is immaterial that at other times it may be used for other purposes.

[**EDITORIAL NOTE.** The decision here is solely concerned with the use of the vehicle. On the one hand, it was contended that the car must be used solely for civil defence work. On the other hand, it was contended that the user at the time of the breach of the regulation was all that was material. It will be noted that the material words of the order are "whilst being used as a civil defence vehicle," and these words do not seem very applicable to exclusive use for civil defence purposes. This court has decided in favour of the second construction of the order. There would appear to be some inconsistency between the statements that the car was started by the police officer and that the lead from the distributor had been removed, but it is so stated in the case.

FOR THE MOTOR VEHICLES (CONTROL) ORDER, 1940, see BUTTERWORTHS EMERGENCY LEGISLATION, AGRICULTURE, [41] 26*f*.]

APPEAL by the inspector of police by way of case stated by the Stipendiary Magistrate for Birmingham.

On Aug. 3, 1940, an information was laid by an inspector of the Birmingham City Police against the respondent alleging that he on July 21, 1940, being the owner, or the person authorised by or on behalf of the owner, to drive a motor car failed to comply with the Motor Vehicles (Control) Order, 1940, in that, while the motor car was unattended during the hours of daylight, he did not secure that the provisions of that order were complied with.

The following facts were proved or admitted. On July 21, 1940, at 12.25 p.m., the car was standing in the highway unoccupied. The doors were unlocked and the ignition key was in the dash. A police officer entered the car, turned the ignition key and the engine started and ran smoothly until switched off. The respondent is the head A.R.P. warden for a district of the city of Birmingham and was on duty and visiting an A.R.P. post at the time in the ordinary course of his duty. The motor car was the private property of the respondent, but was insured by the A.R.P. committee for the city of Birmingham, and the respondent was allowed petrol and allowances for the use of the car in the course of his duties, as the use of the car was essential for the carrying out of those duties. The lead from the distributor was removed in accordance with a written order sent out by the Chief Constable of Birmingham to various departments.

The magistrate found as a fact that the motor car had not been immobilised within the meaning of the order and that at the time in question it was being used as a civil defence vehicle. He dismissed the information.

The inspector of police appealed.

Vernon R. M. Gattie for the appellant. A

The respondent did not appear and was not represented.

Gattie: This was not a civil defence vehicle within the meaning of the order. It may be true to say that it was used as a civil defence vehicle, but, to come within the order, the vehicle must never be used for any other purpose, or, at any rate, during some definite period must be used B solely for civil defence purposes.

VISCOUNT CALDECOTE, L.C.J.: A question of interpretation arises in this case, but the question of interpretation arises upon a particular set of facts which has been found by the magistrate. Counsel for the appellant C suggests that it is desirable that a ruling should be obtained from the court as to the proper interpretation to be placed upon the regulation in question, which is the Motor Vehicles (Control) Order, 1940. I doubt whether a ruling of the court could possibly apply or be of assistance to any other set of facts than those found by the magistrate. Art. 1 (1) of D the order requires as follows:

> Subject as hereinafter provided, a mechanically-propelled road vehicle shall not be unattended during the hours of daylight unless [certain precautions are taken].

In this particular case, those precautions were not taken, but the order proceeds, in art. 1 (3), as follows: E

> This article shall not apply to (*a*) a vehicle whilst being used . . . as a . . . civil defence vehicle . . .

The facts as found are that the respondent, who was the owner of the car, is the head A.R.P. warden for a district of the city of Birmingham, that he was actually on duty and visiting the A.R.P. post at the time, in F the ordinary course of his duty, that the motor car was the respondent's own property, which he used for private and business purposes, that it was registered in his name, that he paid the tax, but it was insured by the A.R.P. committee for the city, and that he was allowed petrol and given allowances to use the car in the course of his duties as head warden, as the G car was essential for the carrying out of those duties.

Counsel for the appellant suggested that it was a misinterpretation of the order to find that it was a vehicle that was being used as a civil defence vehicle if in fact it was only being used for the convenience of the air raid warden in order to enable him to get round his posts more quickly. H However, the facts as found include a finding that at the moment it was in fact being used as a vehicle which was essential for the carrying out of the duties as a head warden, and, on a finding of those facts, the magistrate has come to the conclusion that, at the time in question, the car was being used as a civil defence vehicle. In my judgment, there were facts which justified him in coming to that conclusion, and to hold otherwise would be to substitute for the words in art. 1 (3) of the order words which counsel for the appellant has suggested are equivalent words. Applying my mind to the words contained in the order, and to those words only, I think that the magistrate was justified in finding, on the facts, that this vehicle was being used as a civil defence vehicle. I think, therefore, that the appeal should be dismissed.

TUCKER, J.: I agree. The magistrate has stated as one of his findings that, at the time in question, the car was being used as a civil defence vehicle. He therefore directed his mind to the particular user at the moment when it had in fact been found not to be immobilised. I think that that was the material time to take into consideration. The magistrate did not have to consider what was the normal or habitual or general user of the car in question, but the purpose for which it was at that moment being used. On the facts set out, I think that he came to a right conclusion, and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *M. P. Pugh*, Birmingham (for the appellant).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BUTLER ESTATES, LTD., AND ANOTHER *v.* BEAN AND ANOTHER.

[COURT OF APPEAL (Scott, MacKinnon and Goddard, L.JJ.), **July 21, 22, 1941.**]

Landlord and Tenant—Lease—Assignee—Liability for rent—Express covenant by assignee with assignor to pay rent—Assignment to landlord of benefit of express covenant.

On June 22, 1928, the plaintiffs' predecessor let premises to G. & R., Ltd. On Dec. 5, 1935, G. & R., Ltd., assigned the lease to the defendants, who, in the assignment, expressly covenanted to pay the rent and observe the tenant's covenants in the lease. G. & R., Ltd., then went into voluntary liquidation and the plaintiffs claimed in the liquidation £9,000 in respect of future rent. This claim was compromised, G. & R., Ltd., paying £530 to the plaintiffs and assigning to them the benefit of the above covenant. Notice of the assignment to the plaintiffs of the benefit of the covenant was given to the defendants on Jan. 1, 1937. The defendants assigned the lease to G. & R. (1935), Ltd., who in 1940 failed to pay a quarter's rent. The plaintiffs sued the defendants for the rent in arrears, relying upon their rights under the assignment of the benefit of the express covenant in the assignment of Dec. 5, 1935:—

HELD: (i) the covenant in the assignment of Dec. 5, 1935, was not a mere covenant of indemnity. Upon its proper construction, it was an express covenant to pay the rent, and the defendants, although they were assignees who had further assigned the lease, were liable to the plaintiffs, who had taken an assignment of the benefit of that covenant, for the rent in arrear.

(ii) the payment of £530 made in the liquidation was paid by way of compromise of a claim in the winding up and could not be regarded as a payment made towards any particular quarter's rent.

Decision of Lawrence, J., (p. 355, *ante*) *affirmed.*

[**EDITORIAL NOTE.** The position under a lease is that the original lessee is liable to pay the rent to the landlord both by privity of estate and under the covenant to pay rent which is always included in a lease. His liability by privity of estate ceases when he assigns the term, but his liability under the covenant continues throughout the term. An assignee of the term is only liable to the landlord by privity of estate, and this liability can exist only while the term is vested in him, As soon as he assigns the lease, his liability to the landlord (under the usual forms in use) ceases. The original lessee is, therefore, in the awkward position that, upon failure of any assignee to pay the rent, the landlord can sue him for the rent, although he has long since parted with all interest in the premises. To provide for this, it has been the practice of conveyancers to include in every assignment a covenant by the assignee to indemnify the assignor against future non-payment of the rent and breaches of the covenants in the lease, except that, since 1925, such a covenant has been implied by the Law of Property Act, 1925, s. 77 (1) (c), where the assignment is for valuable consideration. Where, therefore, A is the landlord, B the tenant, and C, D and E successive assignees of a lease, and E fails to pay the rent, A, the landlord, will sue B, the original lessee. By virtue of the covenants of indemnity, B can bring in C, C can bring in D, and D can, if it is worth while, bring in E, as parties to the action and thus judgment can be obtained against the person really liable to pay the rent by virtue of this chain of indemnities. However, the best laid plans are liable to fail and this plan may fail if, say, D is a limited company and goes into liquidation and is dissolved. C cannot bring in E, because there is no covenant between them, and the result is that C, who, like B, the original lessee, has long since parted with all interest in the premises, is left with the liability to pay the rent, for the liability under the covenant of indemnity continues throughout the term. The ingenuity of conveyancers was not found wanting, however, and, in these circumstances, it was the practice for D before dissolution to assign the benefit of the covenant by E to C. The operation of such an assignment was considered by the Court of Appeal in *Re Perkins, Poyser* v. *Beyfus* (4), and more recently in *Josselson* v. *Borst*, [1938] 1 K.B. 723 ; [1937] 3 All E.R. 722 ; Digest Supp., and there is no doubt that it operates to restore the chain of indemnities. In the present case, the dissolution of the company took place before the chain of indemnities was started, for the original lessee was the company which was being wound up, and quite obviously the usual procedure was inapplicable, for there was no one to whom the benefit of a mere covenant of indemnity could be assigned. Quite obviously, too, the landlord would have a substantial claim in the winding up, because the company was the original lessee and would, in effect, be a surety for the rent throughout the term of 99 years, of which some 91 years remained unexpired. In these circumstances, the original lessee took a covenant from its assignee to pay the future rent and observe the covenants in the lease, omitting the usual words by which the assignee covenants to indemnify the assignor against all liability in respect of the rent or covenants. The original lessee later assigned the benefit of this covenant to the landlord and gave notice of the assignment to the assignee. The question thus arose whether the covenant by the assignee was an express covenant to pay the rent which, upon the assignment of the benefit of it to the landlord, put the assignee in the same position as the original lessee (and the fact that the landlords reduced a claim in the liquidation from £9,000 to £530 is some evidence that they took this view of the matter), or whether, although all reference to indemnity was omitted, the covenant was yet, upon its proper construction, a mere covenant of indemnity. Both Lawrence, J., and the Court of Appeal have found no difficulty in coming to the conclusion that this was an express covenant and not one of indemnity only. Despite this unanimity of opinion the matter could hardly have been said to be one which was free from doubt upon the authorities, and the matter may be taken to the House of Lords. The authorities to be considered are *Re Poole & Clarke's Contract* (6), *Harris* v. *Boots, Cash Chemists* (*Southern*), *Ltd.* (1) and *Reckitt* v. *Cody*, [1920] 2 Ch. 452; 40 Digest 285, *2466*. These cases only bear indirectly on the point here considered, but they might support a suggestion that a covenant in the form here considered, omitting all reference to indemnity, operates as a covenant of indemnity only. The matter has been dealt with at rather greater length than is usual in these notes, because correspondence has shown that the shorter note to the case below was not understood by all.

AS TO LIABILITY OF ASSIGNEE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 364, 365, paras. 440, 441; and FOR CASES, see DIGEST, Vol. 31, pp. 409-412, Nos. 5548-5586.]

Cases referred to:

(1) *Harris* v. *Boots, Cash Chemists* (*Southern*), *Ltd.*, [1904] 2 Ch. 376; 31 Digest 415, *5620*; 73 L.J.Ch. 708.

(2) *James Smith & Sons* (*Norwood*), *Ltd.* v. *Goodman*, [1936] Ch. 216; Digest Supp.; 105 L.J.Ch. 70; 154 L.T. 113.

(3) *Goldsmid-Montefiore* v. *Cavendish Land Co., Ltd.* (1940), Unreported.

(4) *Re Perkins, Poyser* v. *Beyfus*, [1898] 2 Ch. 182; 31 Digest 417, *5636*; 67 L.J.Ch. 454; 78 L.T. 666.

(5) *British Union & National Insurance Co.* v. *Rawson*, [1916] 2 Ch. 476; 8 Digest 431, *84*; 85 L.J.Ch. 769; 115 L.T. 331.

(6) *Re Poole & Clarke's Contract*, [1904] 2 Ch. 173; 31 Digest 413, *5589*; 73 L.J.Ch. 612; 91 L.T. 275.

APPEAL by the defendants from a decision of LAWRENCE, J., dated May 9, 1941, and reported [1941] 2 All E.R. 355, where the facts are fully set out.

R. F. Roxburgh, K.C., and *J. L. Stone* for the appellants.

Gerald Gardiner for the respondents.

Roxburgh, K.C., referred to *Harris* v. *Boots, Cash Chemists* (*Southern*), *Ltd.* (1), *Goldsmid-Montefiore* v. *Cavendish Land Co., Ltd.* (3), *Re Perkins, Poyser* v. *Beyfus* (4), *British Union & National Insurance Co.* v. *Rawson* (5) and *Re Poole & Clarke's Contract* (6).]

SCOTT, L.J.: This is an appeal from a decision of LAWRENCE, J., in a case in which the plaintiffs were the successors in title of the original landlord of a property leased to Gill & Reigate, Ltd. One plaintiff is the *cestui que trust* of the original freeholder, and the second plaintiff, Lloyds Bank, is her executor. The action is brought against the assignees under a deed of assignment entered into by the company as the original tenant of the residue of a lease for 99 years dated June 22, 1928. The question in the appeal is as to the meaning and effect of one covenant in the deed of assignment. It is in these words:

> The purchasers [defendants] hereby jointly and severally covenant with the company as follows: (*a*) to pay the future rent and observe the covenants on the part of the lessee contained in the said lease dated June 22, 1928 . . .

That assignment from Gill & Reigate, Ltd., to the defendants in the action, Bean and Riley, was made on Dec. 5, 1935, at a time when a reconstruction of the original company was obviously in contemplation, for the original company covenanted with the purchasers, *inter alia :*

> . . . within two months from the date hereof to submit to its members a resolution that the company be wound up and if such resolution shall be passed to procure the liquidator to consent to the registration by the purchasers or their assigns or A nominees of a company to be called Gill & Reigate (1935) Ltd. or some other suitable name containing the words " Gill " and " Reigate."

The two purchasers were obviously concerned in the reconstruction and in the flotation of the new company with that name, and the sale included various assets as well as the undertaking of Gill & Reigate, B Ltd., the purchase price being £10,000. There was also a provision, contained in the last recital of the assignment, that, pending completion of the sale and purchase, the company should carry on its business in the normal course. The rent payable under the lease was £3,600 per annum, payable quarterly. Therefore, £900 was payable each quarter. C Gill & Reigate, Ltd., the original tenants, duly passed their resolution and went into voluntary liquidation. The plaintiffs (to whom I will refer as the landlords) submitted a claim in the liquidation by way of proof for the damages which they contemplated they might suffer by reason of the winding up of the company and the loss of the whole rent D of £3,600 per annum for the rest of the term. They estimated that they could relet the premises, if they had them, at £3,000 per annum, and they put forward a capitalised claim on that basis of £9,000 as the measure of their loss of future rent. The liquidator did not admit the claim, and, after certain proceedings, an agreement was reached by which E the liquidator paid the landlords £530-odd to settle the whole claim. In Aug., 1940, the landlords issued a writ specially indorsed for one quarter's rent, claiming that it was due under the covenant in the assignment which I have read. Their claim was put in this way. They recited the assignment of Dec. 5 from Gill & Reigate, Ltd., of the premises F in question, a subsequent assignment of Jan. 9, 1936, to the new company for the unexpired residue of the term and a further assignment between Gill & Reigate, Ltd., the company in liquidation, and its liquidator to the landlords of the benefit of the covenant in the assignment from Gill & Reigate, Ltd., to the defendants, who were therein called the G "purchasers." That, be it observed, was a specially indorsed writ claiming £900 as a quarter's rent due under the covenant in the assignment. LAWRENCE, J., held that the plaintiffs were entitled to recover that sum as being the quarter's rent due and payable under the covenant, into which the purchasers from the old company, the tenants, had H entered, that they would pay the future rent reserved by the lease. He also held that the defendants were not entitled to set off, as a payment which had been made towards that quarter's rent by the liquidator, the £530-odd which I have said that he had paid in compromise of the claim. From that judgment the defendants appealed to this court, and counsel on their behalf, in a very interesting, careful and forcible argument, submitted that the judge had gone wrong on both points, on the main point as to the true meaning of the covenant to pay the future rent contained in the assignment, and on the minor point as to whether, assuming he was right on the first point, the amount due for the quarter in question as future rent had not been reduced by the £530-odd. I will follow him in dealing with the major point first.

As I see it, the question is purely one of interpretation. The question is, as counsel for the defendants put it, whether the words of the covenant in the assignment ought not to be read as modified by the principle of construction of such a covenant which he submitted was applicable —namely, that the assignees, not being parties by privity of estate or contract so as to be directly liable to the landlords, cannot be held to have intended to do more than indemnify the landlords against a possible loss of rent through their not being able to enforce the liability under the lease. He cited certain cases, of which the chief one was *Harris* v. *Boots, Cash Chemists* (*Southern*), *Ltd.* (1). The headnote states the effect of the judgment there given by WARRINGTON, J., [p. 376]:

> The true object of the covenant by the assignee usually inserted in an assignment of leaseholds is merely to indemnify and protect the lessee against breach of covenants contained in the lease, and consequently a lessee is not entitled to enforce by injunction the specific performance by his assignee of the negative covenants contained in the original lease by means of the covenant "to perform and observe" the covenants and conditions contained in the lease, and to indemnify the assignor from and against all claims and demands on account of the same.

The form of covenant mentioned in the headnote is, no doubt, the usual form of such a covenant, and that form, it is to be noted, contains in express language, as a part of the covenant, an undertaking to indemnify. WARRINGTON, J., held that that form of covenant is an indemnity, and an indemnity only. He added, at p. 381:

> I think the true object of the covenant entered into on the assignment of the lease is to indemnify and protect the original lessee against breaches of covenant contained in the lease under which he holds.

That may well be the case when the covenant is in the usual form, and I have no doubt that the usual form of covenant does, normally, mean that. This form of covenant, however, is not the usual form. This covenant has no reference to indemnity. It is clear in its terms, which expressly put upon the purchasers the obligation to pay the future rent and observe the covenants on the part of the tenant contained in the lease. The burden of satisfying the court that those express words ought to be read by implication as a mere covenant to indemnify is obviously upon the appellants, and I can see no sufficient ground for reading such a contract of indemnity into that very short and definite covenant. It is a very strong thing to imply a term so different from the natural or legal meaning of the words used as would be involved by the conversion of this covenant to pay the future rent due under the lease into a mere covenant to indemnify against loss of rent. The ordinary rule of implication must apply—namely, that no words are to be read in unless they are necessary to give business efficacy to the document and to justify the conclusion that that must have been the intention of the parties. In the present case, that criterion points, I think, in the opposite direction. The assignment was a mere step in the reconstruction of the old company, the assignees probably finding the necessary capital for the new company, and the fact that it was made for the express purpose of reconstruction is a necessary inference from the provision to which I have already referred, that the company undertook to commence the voluntary winding up within two months. The fact that the company was going to wind up immediately of itself is a sufficient reason for construing the covenant in question as a covenant meaning just what it says, and for rejecting the implied qualification. The lease is recited in the assignment. The words of the covenant "the future rent under the said lease" I think mean what they say—namely, simply the rent payable under the lease. The question whether, if the case arose in the future of a reduction of rent, the rent payable would be the reduced rent does not arise on the question we have to decide here. Equally the possibility of an increased rent under the lease, which is put to us, is a matter which does not arise, although I doubt whether an increase of rent would be consistent with the words used.

For those reasons, I think that there is no sufficient ground for enlarging or qualifying the words of the covenant in that respect. It is perfectly true, as counsel for the appellants said, that a covenant by assignees to pay rent cannot mean rent in the strict sense of the word, because they are not liable for rent as such, but, in the circumstances of the case, the meaning is perfectly plain—namely, that they would be responsible to the landlords for the rent reserved in the lease, and undertook to pay it. For those reasons, I think that the appeal on the main point must fail. I entirely agree with the judgment of the judge on the major point, except for one or two verbal slips which were corrected in the course of the argument before us. On the minor point, he says this:

> It is argued for the defendants that, even if liable, they are entitled to credit for the sum of £530 paid to the plaintiffs by Gill & Reigate, Ltd., under the compromise, and interest thereon [by the liquidator], but, as this sum was not paid as rent, I do not think that that the defendants are entitled to any credit in respect of it in this action.

I agree, because a sum paid by way of compromise of a claim put forward in the winding up for damages suffered extending over the whole period of future rent cannot be regarded as a payment made toward any individual quarter's rent. Therefore, I think that the payment, when received by the landlords, cannot be treated as having been received in part payment of any rent at all, either present or future. For those reasons, I think that the appeal must be dismissed.

MacKinnon, L.J.: I agree. I do not think that I can usefully add anything to what has been said.

GODDARD, L.J.: I agree, and I only wish to say this. WARRINGTON, J., pointed out in *Harris* v. *Boots, Cash Chemists* (*Southern*) *Ltd.* (1), at pp. 380, 381, that an assignor was only concerned when he was parting with the leasehold premises to obtain an indemnity. That was his interest.
A In this case, however, it is obvious from the language used by the parties that the object of this clause was not to get an indemnity. An indemnity in this case would really have been of no use at all, because this clause which we have to construe, and which, on its ordinary and natural meaning, is not a clause of indemnity, is found side by side in the same
B document with a covenant by the assignor to go into liquidation and to disappear. I think, therefore, that it would be a very strong thing in any case to read this covenant as a covenant to indemnify, because it does not say so, but, when one finds that it exists side by side with a covenant by the person who would ordinarily be the person to be
C indemnified that that person should disappear, it is obvious that one cannot read it as a covenant of indemnity or as anything except what the plain words appear to indicate—namely, a covenant to pay the rent.

On the other part of the case, I only have to say this. It seems to me that the money which was paid was money which the landlords
D were entitled to receive as compensation for the fact that they would no longer have a tenant to whom to look. That is the reason, I think, which underlies the decision in *James Smith & Sons* (*Norwood*), *Ltd.* v. *Goodman* (2). Ordinarily speaking, they would be entitled throughout the currency of the lease to look, not only to whatever sitting tenant
E there might be in possession, with whom they would have privity of estate, but also to the tenants or their representative, with whom they had privity of contract. As the tenants are going into liquidation, the landlords are entitled, under the authority of these cases, to prove in the liquidation for a sum of money which has to be calculated according
F to the value of what the landlords are really losing—namely, their right to look to the tenants. I cannot think that this £530-odd can be regarded as being paid as rent. It was really paid as compensation for losing the right to look to the tenants. Consequently, the defendants are not entitled to any credit in respect of it.

G *Appeal dismissed with costs. Leave to appeal to the House of Lords.*

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Ansell & Sherwin*, Birmingham (for the appellants); *R. C. Bartlett & Co.* (for the respondents).

H [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* NATIONAL ARBITRATION TRIBUNAL, *Ex parte* BOLTON CORPORATION.

[Court of Appeal (MacKinnon and du Parcq, L.JJ., and Bennett, J.), **July 7, 8, 23, 1941.**]

Trade and Trades Unions—Settlement of trade differences and disputes—Reference to National Arbitration Tribunal—"Trade dispute"—"Workman"—Industrial Courts Act, 1919 (*c.* 69), *s.* 8—*Local Government Staffs (War Service) Act,* 1939 (*c.* 94), *s.* 1—*Emergency Powers (Defence) Act,* 1939 (*c.* 62), *s.* 1 (4)—*Emergency Powers (Defence) Act,* 1940 (*c.* 20)—*Defence (General) Regulations,* 1939 (*S.R. & O.,* 1940, *No.* 1217), *reg.* 58AA—*Conditions of Employment and National Arbitration Order,* 1940 (*S.R. & O.,* 1940, *No.* 1305), *art.* 2.

By the Conditions of Employment and National Arbitration Order, 1940, art. 2, the Minister of Labour and National Service is given power to refer any "trade dispute" to the National Arbitration Tribunal for settlement. Purporting to act under this power, the Minister referred to arbitration a claim by the National Association of Local Government Officers that it should be a condition of service of the officers in the employment of a certain local authority that, in the event of their being called upon to serve in His Majesty's Forces or in the civil defence units, the difference between their pay in the Forces and the remuneration which they would have received if they had continued in the service of the local authority should be made up to them. The local authority applied for an order prohibiting the arbitration tribunal from adjudicating upon the dispute, on the ground that there was no "trade dispute" within the meaning of that term as used in the order :—

Held : (i) the Local Government Staffs (War Service) Act, 1939, s. 1, confers a discretionary power upon local authorities to make up the pay of their officers after being called up for service, and the time for the exercise of the discretion is when an employee ceases to be in the service of a local authority and joins His Majesty's Forces.

(ii) an order of any other authority which purported to deprive a local authority of that discretion would be illegal. The order of prohibition applied for ought to be made.

(*per* Bennett, J. :) the dispute between the Bolton Corporation and the National Association of Local Government Officers is not a trade dispute within the meaning of reg. 58AA. The Minister, therefore, had no power to refer it to the tribunal, and the tribunal had no jurisdiction to adjudicate upon it.

Decision of the Divisional Court (Viscount Caldecote, L.C.J., and Tucker, J., Atkinson, J., dissenting) ([1941] 1 All E.R. 413) *reversed.*

[**EDITORIAL NOTE**. The decision of the Court of Appeal is based on the one ground that the corporation have a discretion whether or not they will make up the pay of their officers after they have been called up for service and that they cannot be asked to forgo that discretion, but are required by statute to exercise it with reference to the circumstances of each individual case. Upon this they are in agreement with the dissenting judgment of Atkinson, J., in the court below, but there were many other points raised and decided in the court below which the Court of Appeal have not dealt with, save that Bennett, J., has stated his views upon whether or not this was a trade dispute and whether all officers of a corporation can be said to be workmen within the meaning of the statutory definition. The decision of the Court of Appeal, shortly stated, is that local authorities are creatures of statute and are bound by the terms of the statute creating them. One of these is that they are custodians of the ratepayers' money and that it can only be spent in the way and to the extent that they, in the proper exercise of their discretion, determine. They are not to be bound to make certain payments in all cases by the decision of an outside body.

As to Remuneration of Officers, see HALSBURY, Hailsham Edn., Vol. 21, pp. 136, 137, para. 248; and for Cases, see DIGEST, Vol. 33, pp. 75, 76, Nos. 483-494.]

A Cases referred to:

(1) *Shipton* v. *Cardiff Corpn.* (1917), 87 L.J.K.B. 51; 13 Digest 365, *986*; 116 L.T. 687.

(2) *Davies* v. *Rhondda District Urban Council* (1917), 87 L.J.K.B. 166; 19 Digest 602, *291*; 117 L.T. 622.

(3) *Aylott* v. *West Ham Corpn.*, [1927] 1 Ch. 30; 34 Digest 85, *628*; 95 L.J.Ch. 533; 135 L.T. 424.

B (4) *Kutner* v. *Phillips*, [1891] 2 Q.B. 267; 42 Digest 768, *1950*; 60 L.J.Q.B. 505; 64 L.T. 628.

(5) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 42 Digest 989, *180*; 74 L.J.K.B. 525; 92 L.T. 710.

(6) *Marshall* v. *Glanville*, [1917] 2 K.B. 87; 34 Digest 62, *379*; 86 L.J.K.B. 767; 116 L.T. 560.

C (7) *R.* v. *St. Pancras Vestry* (1890), 24 Q.B.D. 371; 16 Digest 310, *1217*; 59 L.J.Q.B. 244; 62 L.T. 440.

(8) *Holloway* v. *Poplar Corpn.*, [1940] 1 K.B. 173; [1939] 4 All E.R. 165; Digest Supp.; 109 L.J.K.B. 39; 161 L.T. 384.

(9) *Roberts* v. *Hopwood*, [1925] A.C. 578; 33 Digest 20, *83*; 94 L.J.K.B. 542; 133 L.T. 289.

D (10) *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 20 Digest 197, *1*; 93 L.J.K.B. 390; 130 L.T. 164.

Appeal by the Bolton Corporation from an order of the Divisional Court (Viscount Caldecote, L.C.J., and Tucker, J., Atkinson, J., E dissenting), dated Mar. 18, 1941, and reported [1941] 1 All E.R. 413. The facts are fully set out in the judgment of MacKinnon, L.J.

Sydney G. Turner, K.C., and *E. J. C. Neep* for the Bolton Corporation, the appellants.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *W.* F *Arthian Davies* for the Minister of Labour and National Service.

W. P. Spens, K.C., and *C. Erskine Simes* for the National Association of Local Government Officers.

Turner, K.C.: In the present case there is no trade dispute, because there is no dispute in a trade. The dispute is between the corporation G and the National Association of Local Government Officers. The definition does not purport to alter the meaning of the word "trade." What it really does is to limit the classes of dispute in a trade which are to be within the jurisdiction of the tribunal. There is nothing in the definition in the Industrial Courts Act, 1919, s. 8, to exclude H the ordinary meaning of the word "trade," A dispute must be one which arises in a trade in order that it may come within the jurisdiction of the tribunal. The definition of workman in sect. 8 of the 1919 Act is "any person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work, or otherwise." If the word "otherwise" includes every type of employment, all the words in this definition which follow the word "employer" become unnecessary. The position of a man who has ceased to serve a local authority is shown by *Marshall* v. *Glanville* (6). When an employee enters His Majesty's Forces, he ceases to be in the employ of the local authority. On a fair construction of the Conditions of Employment and National Arbitration Order, 1940, its terms do not A include *ex gratia* payments to workmen after the employment has ceased. A local authority can deal with ratepayers' money only in accordance with statutory authority. The Local Government Staffs (War Service) Act, 1939, s. 1, confers a discretion upon local authorities. If the tribunal can turn this discretion into an obligation in the case of a B local authority, they can equally well do so in the case of a private employer. Sect. 1 of the Act imposes a duty upon a local authority to exercise a proper discretion. The discretion must be exercised at the proper time, which is the time the employee is called up to join His Majesty's Forces. The tribunal has no power to turn "may" into C "must." [Counsel referred to *R.* v. *St. Pancras Vestry* (7), *Holloway* v. *Poplar Corpn.* (8) and *Roberts* v. *Hopwood* (9).]

The Solicitor-General: The main point for the Minister of Labour is that all the officers are workmen, and there is a trade dispute notwithstanding that the employer is an administrative body. The argument D put forward on behalf of the appellants involves the view that, under the regulation, some limit must be placed upon the wide words used in the definition. There have been many cases, however, in which disputes between a corporation and its officers have been referred to the industrial court. The words "trade dispute" are defined in the E Industrial Courts Act, 1919, s. 8. When one finds the words in the body of an order, they must be read in the meaning there set out. Even if one applies the *ejusdem generis* rule to the words "or otherwise," one cannot come to a result which does not embrace all the employees of a local authority. That which it is asked that the Bolton Corporation F shall do has already been done by the greater number of local authorities in the country. The Bolton Corporation is resolved to do nothing. It would be unfortunate if some kind of means test were introduced. It may be a wise exercise of discretion for a local authority to say that they will treat all employees alike. Under the corresponding legislation G of the Great War, many local authorities offered to make up the full pay of those of their employees who joined His Majesty's Forces. That was held to be *ultra vires.* The local authorities were not entitled to use the ratepayers' money to encourage recruiting. In 1916, an Act was passed to authorise a local authority to make such payment. A H distinction must be made between a mere gratuity and a contract by the terms of which one gets contractual benefits. In *Aylott* v. *West Ham Corpn.* (3), it was held that the authority had power to make the payment, and that it therefore followed that the authority had power to contract to make the payment. The payment of a gratuity would be invalid unless there was express statutory authority to make

the payment. The position is different, however, with regard to a
contract. The Local Government Act, 1933, empowers a local authority
to pay reasonable remuneration. If a local authority makes a contract
which is reasonable from its own point of view, and with a view to
A satisfying its servants, it gets a return for the money it pays. It may
be difficult to draw a line between a mere gratuity and a contract. There
is real dissatisfaction at Bolton, and, unless the matter is dealt with,
there may be a trade dispute. If so, it would be reasonable for the
Bolton Corporation to make a contract by which they would stipulate
B that, on their men undertaking to return to the service of the corporation
after the war, they would pay them £x. The Local Government Staffs
(War Service) Act, 1939, provides that a local authority may pay a
man the difference between his service pay and his full civil pay. If
local authorities may pay such a sum, they may equally well contract
C to pay such a sum. Where it is found that the matter may be referred
to a tribunal, the tribunal has power to imply a term into the contract.
There must be an implication that the authority are able to carry
out that which they may be required to carry out. All the officers
of the local authority are workmen. It may be that some cases may
D have to be considered by the tribunal. [Counsel referred to *Shipton*
v. *Cardiff Corpn.* (1).]

Spens, K.C.: The claim is one to have a term inserted into the contract
of the corporation's officers. It is not an attempt to get specific performance
of the Local Government Staffs (War Service) Act, 1939,
E which is the Act which authorises the payments to be made. The
court is concerned only with those persons who are in the employment
of the corporation at the present time. If a workman is in the employment
of the corporation when he is called up for military service, he
will cease to be in the corporation's employment. The matter is in the
F hands of the corporation. The association is asking that this contractual
right shall be given to any person who is in the employment of the
corporation at the time when he is called up. There is no difference
in principle between the present claim and any other claim which a
person might make on ceasing to be in the corporation's service, and they
G might say that they would hand in their notices if their claims were not
allowed. That would be a dispute, and the matter could be referred
to the National Arbitration Tribunal, which could then make an award,
provided that the rights were not fixed by statute. In the present case
the trade dispute is between the corporation and such of its officers as
H are members of the National Association of Local Government
Officers. If a dispute either exists or is apprehended, it may be
reported to the Minister, who may remit the matter to the
tribunal. All that the National Arbitration Tribunal is being
asked to do is to insert into the terms of the contract in respect of those
of the members of the National Association of Local Government Officers
who are employees of the corporation a term similar to one which

increases salaries or wages. The regulation and the order are both made under the Emergency Powers (Defence) Act, 1939, s. 1 (2) (iv). In order that a matter may be referred, there must be a trade dispute. There must be a reference to the tribunal, a finding by the tribunal and an award. The award may have the effect of putting into the contract a clause which, until varied by a subsequent agreement, decision or award, will be part of the contract and binding upon the local authority. An advantage which was not originally part of the contract can thus be given to an employee. Having regard to the circumstances which exist at the present time, it is reasonable that it should be made a term of the contract of those members of the National Association of Local Government Officers who are employed by the Bolton Corporation that their pay shall be made up to them while they are serving with His Majesty's Forces. It was found by ATKINSON, J., that the Act referred to workmen in the ordinary sense of the word, and he based that view upon Part III of the Act. The Industrial Courts Act, 1919, Part III, is a separate part of the whole Act. All through the Act, except in Part III, the governing phrase is "trade dispute," and that term is clearly defined in sect. 8. There is nothing which justifies the court in putting any limit upon the words "trade dispute," in view of the wide words of the definition.

Turner, K.C., in reply: It has been argued that, by the Local Government Act, 1933, a local authority has certain powers as to the payment of remuneration, and that it can contract with an employee that it will make certain payments to him after the employment has ceased. As a matter of fact, the payment of remuneration has always been regulated by statute. A local authority has no power to make payments if there is no statutory authority to do so. The Local Government Act, 1933, s. 106 (2), says that a local authority may pay such remuneration as may be reasonable. Those words do not confer upon a local authority any power to make a payment to an officer after he has ceased to be in their employment. Notwithstanding the provisions of the Local Government Act, 1933, it would be unlawful for a local authority to pay, or to agree to pay, a pension to an employee after he had ceased to be in their service, except under certain statutes and subject to the conditions therein laid down. The local authorities are trustees of the money of the ratepayers, and they cannot pay anything without statutory authority for such payment. If local authorities make unauthorised payments, the auditor can intervene. It must be remembered that for a long period in the Great War enlistment was voluntary. The Solicitor-General has referred to *Shipton* v. *Cardiff Corpn.* (1). There might have been an element of consideration in making payments to men to join His Majesty's Forces when they were under no obligation to do so. In the present war, however, there is an obligation to serve. In *Shipton* v. *Cardiff Corpn.* (1), ROWLATT, J., said that it seemed to him that the contract was *ultra vires* the corporation. The alternative way in which the case has been put is that, as the Local Government Staffs (War Service) Act, 1939, says that local authorities may make payments, it necessarily follows that they may agree to pay. That contention is based upon *Aylott* v. *West Ham Corpn.* (3), which was cited by the Solicitor-General. The observations made in that case, however, were made under the Local Government (Emergency Provisions) Act, 1916, which was the Act then being considered. So far as the remedy of prohibition is concerned, *R.* v. *Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (*1920*), *Ltd.* (10) deals with the question as to the appropriate time to apply for prohibition. In the present case, the tribunal say that they have a reference and that they are going on with it. I ask for a prohibition.

MacKinnon, L.J.: This is an appeal from the Divisional Court, who refused, upon the motion of the Bolton Corporation, to issue a writ of prohibition to the National Arbitration Tribunal. That tribunal is constituted pursuant to the Defence (General) Regulations, 1939, and the Conditions of Employment and National Arbitration Order, 1940. The matter arises in this way. In a circular of Apr. 25, 1939, the Minister of Health informed local authorities that legislation was in contemplation which would empower such authorities to grant leave of absence to any of their employees to enable them to serve in His Majesty's Forces and to make up their service pay during such absence to the amount of their salary previously paid by the authority. The Lancashire and Cheshire Provincial Council for the Professional, Technical, Administrative and Clerical Services of Local Authorities (in effect, what is known as a Whitley Council) by letters of May 1 , 1939, and June 19, 1939, to the Bolton Corporation recommended that officers of the corporation should be granted such leave of absence and should have their service pay so supplemented. On Aug. 2, 1939, the corporation resolved that they would not adopt this recommendation. On Sept. 5, 1939, the Local Government Staffs (War Service) Act, 1939, received the royal assent, and by sect. 17 (2) was to be deemed to have come into operation at the beginning of the period of the present emergency. This Act is not in the terms adumbrated by the circular of the Minister of Health dated Apr. 25, 1939, and referred to above. Sect. 1 (1) provides that, where an employee of a local authority ceases to serve it in order to undertake war service, the authority shall have power to make him certain payments. By sect. 1 (2), the authority, while such person is engaged in war service:

> . . . may pay to him . . . a sum which shall not exceed the remuneration which he would have received if he had continued to serve in his civil capacity, after deducting therefrom the amount of his war service pay.

On Sept. 7, 1939, the body described above as a Whitley Council wrote to the Bolton Corporation renewing the recommendation they had made in their letters of May 1, 1939, and June 19, 1939. Between Sept., 1939, and April, 1940, the corporation reconsidered the matter, and received deputations, but adhered to their decision of Aug. 2, 1939, that they would not adopt this recommendation.

In Aug., 1940, a trade union called the National Association of Local Government Officers made application to the Minister of Labour pursuant to the Conditions of Employment and National Arbitration Order, 1940, alleging that a trade dispute existed, or was apprehended, between the Bolton Corporation and certain of its officers. The Minister, pursuant to art. 2 (2) of that order, referred the matter to Bishop, the secretary of the Whitley Council. Bishop approached the corporation with a view to settlement of the dispute, but the corporation, after reconsideration, adhered to their previous decision. Thereupon, under art. 2 (4) of that order, the Minister made an order dated Feb. 4, 1941, which recites that a trade dispute exists, or is apprehended, between the above-mentioned trade union and the Bolton Corporation :

> . . . arising out of a claim that it shall be a condition of service of officers in the employment of the corporation that in the event of their service in His Majesty's Forces or in civil defence they shall have made up to them the difference between their new pay and the remuneration which they would have received if they had remained in the actual service of the corporation.

Then the Minister .

> . . . hereby refers the said dispute for settlement to the National Arbitration Tribunal.

The president of this tribunal is Simonds, J. When, upon this reference, the parties appeared before him and his colleagues, counsel for the corporation took a preliminary objection to the jurisdiction of the court and the legality of this reference to it by the Minister. He intimated that he proposed to apply for a writ of prohibition, and the tribunal accordingly adjourned the proceedings for that to be done. Notice of motion dated Mar. 3, 1941, for such writ was duly served. In applying for leave to serve that notice of motion, the applicants, pursuant to R.S.C., Ord. 59, r. 3 (2), filed a statement as therein required, and in para. 3 thereof specified seven grounds on which the relief of prohibition was sought, under headings (*a*) to (*g*).

The motion was heard by the Divisional Court on Mar. 18, 1941, and by a majority (Viscount Caldecote, L.C.J., and Tucker, J.) was dismissed. Atkinson, J., dissented, thinking that prohibition should be granted.

By notice of Mar. 31, the Bolton Corporation appealed to this court, and we heard the arguments on July 7, 8, 1941. The applicants' statement, pursuant to R.S.C., Ord. 59, r. 3 (2), conveniently takes the place of a statement of claim. That, as I have said, sets out seven grounds on which their claim is based. The majority of the Divisional Court held that none of them was well-founded. As regards the first four of them, (*a*), (*b*), (*c*) and (*d*), I do not find it necessary to come to any definite conclusion. I have had the opportunity of reading the judgment which Bennett, J., is about to deliver. In that, and in the dissentient judgment of Atkinson, J., below, there are forcible reasons for a conclusion that, despite the extreme generality of the definitions of "trade dispute" and "workman" imported from the Industrial Courts Act, 1919, this was not a "trade dispute," and the applicants were not "workmen." However, it is not necessary for me to consider this branch of the case at greater length, or with a confident decision, seeing that, on A the remaining contentions under (*e*), (*f*) and (*g*), I think that the decision of the Divisional Court was wrong and that this appeal ought to succeed.

A local authority like the Bolton Corporation can expend the ratepayers' money pursuant to statutory authority only. Before 1939, the authority to spend that money in salaries to the members of the applicant B trade union was given by the Local Government Act, 1933, s. 106, which provides that the council may appoint officers, and may pay to an officer "such reasonable remuneration as they may determine." It also provides that such an officer "shall hold office during the pleasure of the council." The enlargement of the power so conferred so as to make possible payments C of the type in question in this case was conferred by the Local Government Staffs (War Service) Act, 1939. It seems to me clear that, upon the terms of sect. 1 (1) of that Act, any decision to make up the war service pay of an employee falls to be made when the particular employee in fact ceases to be employed, when he joins the Forces. That it also involves the exercise D of a discretion by the authority in each case is, I think, also manifest, and this is emphasised by the terms of sect. 1 (3) and its proviso. The award which is sought from the National Arbitration Tribunal is one to compel the corporation to agree in advance that every officer who at a future date shall be called up shall *ipso facto* enjoy the advantage which the corpora- E tion are empowered to give him under this Act. As I pointed out during the argument, this would have the result that, if there was an officer so unsatisfactory and incompetent that the corporation were minded to dismiss him, but by his good luck he was called up for service just before they gave him notice of dismissal, the corporation would be bound to go F on making up his salary to the end of the war. A similar situation would arise in the case of an officer engaged only for a stated period of probation, or an officer who had himself given notice to terminate his employment, if either of them happened to be called to the Forces before the expiration of the period of probation or the notice to leave, respectively. However, G the most important thing is that the award would deprive the corporation of their right to exercise their discretion in individual cases, and that, I think, is a right which the Act of 1939 confers upon the corporation.

During the Great War, certain local authorities passed resolutions to the effect of that which the Bolton Corporation are now being asked to H pass. They had no statutory power so to deal with the ratepayers' money and their resolutions were *ultra vires*: *per* Rowlatt, J., in *Shipton* v. *Cardiff Corpn.* (1), at p. 53. It was necessary, therefore, to pass the Local Government (Emergency Provisions) Act, 1916, which legalised the previous *ultra vires* action of the Cardiff Corporation, as was held by Rowlatt, J., in that case, and the same decision was arrived at in this court in *Davies* v. *Rhondda District Urban Council* (2). It was argued that, if the corporation passed a resolution that they would confer on all their officers the benefits they are empowered to give by sect. 1 of the Act of 1939, that would be valid and *intra vires*. Reliance for that proposition is based upon *Shipton* v. *Cardiff Corpn.* (1) and *Davies* v. *Rhondda District Urban Council* (2), and upon a *dictum* of Romer, J., in *Aylott* v. *West Ham Corpn.* (3). That may well be so, though I think that, if the corporation passed a resolution that they would make up the pay of all their officers who joined the Forces and that, if any officer was killed or missing, they would for 26 weeks pay his widow or wife the like sum, irrespective of any pension or other benefit to which she became entitled, that would be as much *ultra vires* as if they declared that they would so pay her for 52 weeks, for they would be palpably disregarding considerations which the legislature by the proviso to subsect. (3) has expressly ordered them to take into account as the custodians of the public money. However, if the corporation, if they thought fit, could pass such a resolution, I fail to understand how it can be said to make it legal to order them to do so when they do not think fit. The whole point involved here is that the corporation are empowered to do or not to do a certain thing, as they think fit. When they say that they do not think fit to do it, I cannot see how it can be any justification to take away their discretion and order them to do it by saying that they can do it if they like.

The only passage in the judgment of Viscount Caldecote, L.C.J., in which he deals with this, which seems to me the crucial point of the case, is this. He says ([1941] 1 All E.R., at p. 419) :

> . . . I see nothing . . . in excess of [the powers of the corporation] if they . . . are required by the award of the tribunal to bind themselves in advance to make [these] payments. It is true that this means giving up their discretion . . . but, if a party to a dispute is forced to submit his case to arbitration, it is very likely that he will be deprived of a right, which he would otherwise have, of deciding the matter in issue for himself.

With the greatest respect to Viscount Caldecote, L.C.J., that seems to me to beg the question. The question is whether the corporation can be legally compelled to submit this dispute to arbitration, and the proper answer to it is that, because such a reference might deprive them of the discretion which is their legal right, it ought not to be allowed.

Reference was also made, and reliance placed, on the Emergency Powers (Defence) Act, 1939, and the Emergency Powers (Defence) Act, 1940. It is in effect provided by those Acts that an order in council under emergency powers may overrule or repeal the provisions of any Act of Parliament. I do not see the relevance of these Acts. The only orders in council with which we are concerned are the two to which I referred at the beginning, under which the National Arbitration Tribunal was created. There is no order in council in existence which expressly or impliedly cancels the discretionary power of the corporation under the Act of 1939 and directs that they must exercise those powers whether they like it or not. I have no doubt that, as regards some of their officers, the corporation are bound under the Finance Acts to deduct income tax from the salaries which they pay them. Suppose the trade union put forward a claim that the corporation must pay all salaries without deducting the tax, and suppose they induced the Minister to refer this dispute to the Arbitration Tribunal. If they could discover any order in council which said that a local authority must pay salaries without deducting tax, no doubt that would overrule the Finance Acts and justify the claim. However, if there were no such quasi-repeal of the Finance Acts, the tribunal obviously could not legally decide in favour of the application, and it would be futile to say to the tribunal: "You exist by virtue of an order in council, and the two Acts of 1939 and 1940 say that such an order in council can repeal an Act of Parliament." Because a tribunal is created by an order in council, the Acts of 1939 and 1940 do not authorise the tribunal to disregard the provisions of other Acts of Parliament in their decisions.

It has become a commonplace to characterise the present dreadful conflict as a fight for democracy against dictatorship. In this country, local government is a prominent form of democracy. Parliament in its wisdom has entrusted to their elected representatives the duty of deciding whether they shall spend the ratepayers' money in a certain manner. Under the Act of 1939, I think that those representatives, and they alone, are clothed with the power so to decide. The order of any other authority, or of any tribunal, which purports to deprive them of that power is, in my judgment, illegal. Parliament might, of course, have ordered the local authority to spend money in this way without any option or discretion on their part, though conceivably the ratepayers might have thought it hardly fair to order their money to be so spent unless all other employers were ordered to bear a like burden. However, Parliament has not so ordered, and in no Act or order in council can there be discovered any provision which nullifies the discretion given to the corporation in this matter and orders them to do it whether they approve or not. That being so, I think that the order of any tribunal compelling them so to act must be without any legal foundation. In the result, I think that this appeal should be allowed with costs here and below and the order of prohibition should be made.

DU PARCQ, L.J.: In the Divisional Court, TUCKER, J., conveniently distinguished the grounds of the application before the court under four heads. As to the first three of the grounds in that classification, although I am disposed to agree with the conclusions of VISCOUNT CALDECOTE, L.C.J., and TUCKER, J., I do not find it necessary for the decision of this case to express a final opinion on any of the questions which arise under these heads. In the circumstances, and having regard to the views of my brethren, I think it wise to refrain from so doing. In this judgment, I shall deal only with the fourth ground, which TUCKER, J., stated in the following words ([1941] 1 All E.R., at p. 426):

> The tribunal is being asked to make an award which will compel the corporation

> contractually to assume an obligation towards its officers as a whole which it has no power to undertake, it being limited by statute to making *ex gratia* payments in its discretion to officers who have ceased to be in its service.

There can be no doubt that, before the Local Government Staffs (War Service) Act, 1939, came into force—that is to say, before "the beginning of the period of the present emergency"—it would have been *ultra vires* the corporation to make *ex gratia* payments to officers who had ceased to serve it. That Act expressly empowered the corporation to make to a person engaged in war service who had ceased to serve it payments such as are the subject of the claim which has been referred to the tribunal in this case. The corporation is given power and permission, and, therefore, a discretion, to make such payments *ex gratia*. I agree with the contention of counsel for the appellants that the time for the exercise of that discretion arrives when the officer "ceases to serve" the corporation, and that the corporation ought not to fetter itself in advance by any agreement binding it to make payments which when the time comes, it may not think proper to make. Circumstances may change between the making of such an agreement and the cessation of the officer's service, and payments which at the earlier date seemed likely to be reasonable may be seen to be wholly unreasonable in the light of new facts. It was suggested at the bar that a promise, contractual in form, made by the corporation to an officer to make such payments *in futuro* could be treated as part of the "reasonable remuneration" which the corporation is entitled to pay for present services. I think that in most cases this proposition would hardly be maintainable even if the corporation itself determined that such a promise ought to be made. When the corporation has not so determined, it seems to me to be plain that it would be acting illegally if it sought to bind itself by such a promise. It would, therefore, in my opinion, be guilty of an unlawful act if it now agreed to the "condition of service" mentioned in the Minister's reference to the tribunal.

The respondents contend, however, that, upon the true construction of the Conditions of Employment and National Arbitration Order, 1940, made under the Defence (General) Regulations, art. 58AA, the tribunal, if so advised, may properly make an award which will force this "condition of service" upon the corporation as an implied term in its contracts with all its officers, or at least such of its officers as the tribunal may decide to include in its award. This contention obviously raises an important issue. In the argument for the respondents, much reliance was placed on the Emergency Powers (Defence) Act, 1939, s. 1 (4), which provides as follows:

> A defence regulation, and any order, rule or byelaw duly made in pursuance of such a regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

The language of the Conditions of Employment and National Abritration Order, 1940, must no doubt be read with this subsection in mind, and the respondents contend that, if art. 2 (5) of the order is so read, it will be seen that it empowers the tribunal to compel employers or workmen to enter into an agreement even though the effect of some earlier Act of Parliament is to make that agreement illegal. It must be conceded, I think, that the subsection in effect gives power to the Crown to repeal Acts of Parliament in whole or in part. In theory, at least, what yesterday was an unlawful and even a criminal act may be made lawful to-day by order in council. It is not for the courts to seek to curtail powers which Parliament has conferred. If it is plain that provisions of an Act of Parliament have been impliedly repealed by a defence regulation, it is the duty of the court to disregard those provisions and to give effect to the regulation. It is equally true, however, that, if a regulation can fairly be construed so as to reconcile its provisions with those of earlier legislation, the court should not lean to that interpretation which would treat the earlier legislation as impliedly repealed. It is a well-settled rule that, as was said by A. L. Smith, J., in *Kutner* v. *Phillips* (4), at pp. 271, 272:

> . . . a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim *leges posteriores contrarias abrogant* applies.

It is no doubt significant that the subsection on which the respondents rely contemplates that defence regulations may repeal earlier Acts by implication, and that subsection is certainly in striking contrast with the Industrial Courts Act, 1919, s. 3 (5). It is not legitimate to argue that Parliament cannot have intended that provisions in its own Acts should ever be impliedly repealed or modified by a defence regulation, since Parliament has clearly foreseen such a possibility. It remains true that there is no presumption in favour of implied repeal, and I am of opinion that the subsection, fairly construed, has the following result. If it is impossible to reconcile the provisions of a regulation with those of an earlier Act of Parliament, effect must be given to the regulation, notwithstanding the Act of Parliament. If it is possible fairly to reconcile the regulation with earlier legislation, sect. 1 (4) cannot be invoked. In other words, before the subsection can be brought into play, it must be shown that there is a real inconsistency. It is necessary, therefore, to consider whether the regulation is so inconsistent with the earlier legislation by which the rights of the local authority are limited and their duties defined that it must be taken to supersede it.

Counsel for the respondents did not shrink from contending that, under the relevant statutory order, it would be open to the Minister to refer to the tribunal, and to the tribunal to consider and uphold, a claim on behalf of employers that a statutory minimum wage should no longer be paid, or that the provisions of the Factory Acts as to dangerous machinery should be regarded in a particular trade. In my opinion, this contention is unsound. It is not necessarily unsound because it leads to a startling result. Whenever extensive powers are given, startling results may follow. It is unsound because it overlooks the canon of construction to which I have referred. An enactment which gives power in general words to make an award which will result in the insertion of a term in a contract is by no means necessarily inconsistent with other enactments which provide that some terms cannot lawfully be inserted in any contract. It is to be presumed, in the absence of some clear indication to the contrary, that there is no intention to legalise what is already, by statute, illegal. When, therefore, an enactment provides in general terms that employers and workmen may be compelled to enter into agreements, it must be understood to mean agreements which are not contrary to law.

In the present case, the illegality of what is proposed is perhaps less obvious than it is in the hypothetical instances to which I have referred. As Lord Lindley said in *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (5), at p. 253 :

> Non-lawyers are apt to think that everything is lawful which is not criminally punishable ; but this is an entire misconception.

There Lord Lindley was speaking of breaches of contract, but what he said is no less true of breaches of statutory duty. By force of previous enactments, the corporation would be acting unlawfully if it did what the National Association of Local Government Officers is claiming that it should be compelled to do. I find nothing in the regulations and order, or in the Act under which they are made, which enables me to hold that the tribunal is empowered to compel a subject to enter into an illegal contract. There is, I agree, nothing to prevent the Crown from giving such power to the tribunal. The question is whether the power has been conferred. In my opinion, it has not. Viscount Caldecote, L.C.J., dealt with the corporation's argument under this head by treating their case as analogous to that of an employer who was being deprived of "a right, which he would otherwise have, of deciding the matter in issue for himself," and Tucker, J., mentions with approval a contention of the Solicitor-General that the corporation has been empowered "to make a present" and so placed in the same position as the private individual. This view, in my opinion, does not fully recognise the essential difference between the cases of the local authority and the private individual in respect of such payments as these. Whatever payments a private employer may make to his servants, and whatever may be the motive which prompts him to make them, he will not, as a general rule, be doing what is legally wrong. Local authorities have no right to make payments to their employees otherwise than in accordance with statutory provisions which it is their duty to observe. In the absence of words in an enactment which expressly or by necessary implication authorise them to disregard that duty, it ought not to be held, in my opinion, that they are discharged from the further performance of it.

For these reasons, I have come to the conclusion that, if the tribunal entered further upon the reference, it would either reject the claim altogether or of necessity make an unlawful award and go beyond its jurisdiction. In such a case, I am of opinion that an order of prohibition is clearly an appropriate remedy. I agree with the Solicitor-General's contention that, if there were a possibility that the tribunal might, within its terms of reference, make a lawful award, it would be wrong to grant prohibition. I do not think that such a possibility exists. Even if the tribunal by its award were to modify the demand of the association, for example, by restricting the right to receive the proposed payments to certain officers or classes of officers, or by reducing the amount to be paid, it would still, in my opinion, be compelling the corporation to act illegally. There is no *via media* between the rejection of the claim and the making of an award which there is no jurisdiction to make. It follows, in my opinion, that the appeal should be allowed and the order of prohibition granted.

Bennett, J.: I have had the opportunity of reading the judgments which have just been read by MacKinnon and du Parcq, L.JJ. I agree with them that this appeal should be allowed. I also agree with the reasoning which has led them to that conclusion.

There are a few matters on which I should like to add a few words. In the first place, in my judgment, it is plain that, when the minute or order of reference to the National Arbitration Tribunal is read with the statutory definition of a "trade dispute" in mind, the dispute which the Minister has referred is not a trade dispute. Reg. 58AA authorises the Minister of Labour and National Service by order to make provision for, amongst other matters, establishing a tribunal for the settlement of trade disputes and for prohibiting, subject to the provisions of the order, a strike or lock-out in connection with any trade dispute. Reg. 58AA (4) provides that in this regulation "trade dispute" shall have the same meaning as it has in the Industrial Courts Act, 1919. The effect of these provisions is to limit and confine the power of the Minister of Labour to establishing a tribunal to deal with a trade dispute which falls within the statutory definition. He cannot, by his order, enlarge the jurisdiction of the tribunal which he is authorised to establish. Any provision in the order he is authorised to make which attempted so to do would, in my judgment, be *ultra vires*.

By the Conditions of Employment and National Arbitration Order, 1940, art. 1, the Minister established the National Arbitration Tribunal. By art. 7, the expressions "trade dispute" and "workman" are defined. Both definitions follow exactly the definitions in the Industrial Courts Act, 1919, as, of course, they are bound to do. I will read the definitions:

> "Trade dispute" means any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person. "Workman" means any person who has entered into or works under a contract with an employer, whether the contract be by way of manual labour,

> clerical work or otherwise, be expressed or implied, oral or in writing and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour.

I now turn back to art. 2, and I will read para. (1):

> If any trade dispute exists or is apprehended that dispute, if not otherwise determined, may be reported to the Minister by or on behalf of either party to the dispute A
> and the decision of the Minister as to whether a dispute has been so reported to him or not and as to the time at which a dispute has been so reported shall be conclusive for all purposes.

There have crept into that paragraph three words which, if they have the effect of enlarging the meaning of the expression "trade dispute," ought not to be there. The three words are "or is apprehended." B
I am not sure what these words mean. Apprehended by whom? By the Minister, or by some interested or disinterested spectator? Whatever their intention is, it is clear that the Minister has no power to refer to the tribunal a dispute which someone thinks may arise. His only power is to refer an existing dispute. C

The facts which led up to the minute of reference made by the Minister have been stated by MacKinnon, L.J., and are set out at length in the affidavit of Crute, the deputy town clerk of the Bolton corporation. He exhibits a copy of a letter dated Feb. 4, 1941, written on behalf of the Minister of Labour to the Town Clerk of Bolton, in which the town D
clerk is informed that the Minister has made a minute of reference to the National Arbitration Tribunal. I will read the letter:

> I am directed by the Minister of Labour and National Service to inform you that the National Association of Local Government Officers reported to him by letter on Aug. 21, 1940, a difference between the association and your corporation. I am to state that the Minister has accepted the association's letter as a report of a trade E
> dispute in accordance with the provisions of the Conditions of Employment and National Arbitration Order, 1940, art. 2, and has referred the dispute to the National Arbitration Tribunal in the terms of a minute, a copy of which is enclosed. I am to add that a similar notification has been sent to the National Association of Local Government Officers.

Note the first sentence, the information that: F

> . . . the National Association of Local Government Officers reported to him . . . a difference between the association and your corporation.

A difference between a trade union and an employer of labour cannot, upon any interpretation of the language of the statutory definition, be a trade dispute. Note the words of the next sentence: G

> . . . that the Minister has accepted the association's letter as a report of a trade dispute . . .

The Minister has no power to accept something which is not a trade dispute as a trade dispute and then to refer that something to the National Arbitration Tribunal.

I will now read the minute of reference, which is exhibited to an H
affidavit of Haden Corser sworn on Mar. 5, 1941:

> Whereas on Aug. 21, 1940, a trade dispute existing or apprehended between the National Association of Local Government Officers on the one hand and the Bolton Corporation, Town Hall, Bolton on the other hand, was reported to the Minister of Labour and National Service (hereinafter referred to as the Minister) by the National Association of Local Government Officers (being one of the parties to the said dispute), arising out of a claim that it shall be a condition of service of officers in the employ-

ment of the corporation that in the event of their service in His Majesty's Forces or in civil defence they shall have made up to them the difference between their new pay and the remuneration which they would have received if they had remained in the actual service of the corporation: Now therefore the Minister in exercise of the powers conferred on him by the Conditions of Employment and National Arbitration Order, 1940, art. 2, hereby refers the said dispute for settlement to the National Arbitration Tribunal.

It is plain, in my judgment, that the dispute referred by the Minister is a dispute between the National Association of Local Government Officers on the one hand and the Bolton Corporation on the other. It is equally plain, in my judgment, that a dispute between such bodies is not a trade dispute within the meaning of reg. 58AA, and it follows that the Minister has no power to refer it to the National Arbitration Tribunal, and that that tribunal has no jurisdiction to adjudicate upon it. The point seems to me not to be one of mere form, but to be one of substance. The regulation and the order were made under the provisions of the Emergency Powers (Defence) Acts, 1939 and 1940, and were made to prevent strikes or lock-outs. In the evidence, there is no suggestion of the danger of a strike by anyone in the service of the Bolton Corporation. On this ground, in my judgment, an order of prohibition ought to be made.

The second matter upon which I wish to say a few words arises upon the footing that the dispute referred was a dispute between such officers in the employment of the Bolton Corporation as were members of the association on the one side and the Bolton Corporation on the other. It was so treated in the Divisional Court. Counsel for the corporation submitted for the consideration of the court the proposition that a dispute between such parties could not be a trade dispute, because it was not a dispute in a trade, and that, in order to satisfy the statutory definition, there must be such a dispute. The foundation of the argument was that a local authority was not engaged in a trade. VISCOUNT CALDECOTE, L.C.J., came to the conclusion, as a matter of construction of the statutory definition, that there was a trade dispute and that all the servants of the corporation were workmen within the meaning of the statutory definition of that term. ATKINSON, J., decided that officers of a local authority could not be workmen within the meaning of the statutory definition, and that, for that reason, there was no trade dispute which could be referred to the National Arbitration Tribunal. TUCKER, J., came to a different conclusion. He came to the conclusion, first, that a local authority might be a party to a trade dispute, but, secondly, that not all persons in the service of a local authority were necessarily workmen within the meaning of the statutory definition. In the course of his judgment, he uses this language ([1941] 1 All E.R., at p. 427):

> The affidavit of the deputy town clerk shows that there are 317 "officers" of military age employed by the corporation but not engaged on war service. There is nothing to indicate the nature of the work being performed by these men, or to show that their employment is of such a nature that they cannot be described as persons who have entered into or work under a contract with an employer whether the contract be by way of manual labour, clerical work or otherwise.
>
> It may be that, when this dispute comes before the tribunal for adjudication, the

evidence will show that all or some of the 317 persons described as " officers " are not workmen within the meaning of the definition, and, as to such persons, the tribunal will, no doubt, refuse to make any award. In my view, however, the mere fact that they are described as " officers " is not a sufficient ground upon which this court can say, at this stage, that it is satisfied that the tribunal is being asked to adjudicate in a dispute between the corporation and persons all or some identifiable number of whom cannot be workmen within the meaning of the definition. A

Speaking for myself, with all respect to the opinion of VISCOUNT CALDECOTE, L.C.J., I am not prepared, upon the materials at present before the court, to say that, as a matter of construction of the statutory definition, every servant of a local authority is a workman. The position of such officials as town clerks, medical officers of health, surveyors B and persons serving a local authority in that sort of capacity may be very different from that of persons serving in humbler capacities, such as scavengers or tram drivers or conductors, if the local authority in question has authority to carry on a tramway undertaking. With regard to the conclusion on this point reached by ATKINSON, J., I venture, C with the most sincere respect for any opinion he expresses, to doubt whether it is impossible for any person employed by a local authority as an officer to be a workman. It seems to me to be necessary to know all the facts relating to the employment of an officer before coming to a conclusion as to whether or not that officer is a workman within the D meaning of the statutory definition.

Lastly, with regard to the opinion of TUCKER, J., that the dispute between the Bolton Corporation on the one side and such members of the association as are officers of the corporation on the other can be referred to the National Arbitration Tribunal as a trade dispute, and E that the tribunal should separate, so to say, the sheep from the goats, speaking again with the greatest respect, I cannot think that this is a right course, or a possible course. In order that a dispute may be a trade dispute, the parties to it must fall within the statutory definition. The dispute is not a trade dispute capable of reference unless they do. F In my judgment, a dispute between parties whose identity is not disclosed or cannot be ascertained cannot, as a matter of law, be a trade dispute capable of being referred to the National Arbitration Tribunal, for the reason that it is not possible to say of such parties that they are employers or workmen as defined by the statute. I agree that the appeal G should be allowed.

Appeal allowed with costs. Order of prohibition. Leave to appeal to the House of Lords.

Solicitors: *C. E. C. Browne*, agent for *Town Clerk*, Bolton (for the Bolton Corporation); *McDonnell, Jackson & Co.* (for the National H Association of Local Government Officers); *Solicitor to the Ministry of Labour* (for the Minister of Labour and National Service).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

SALISBURY AND ANOTHER *v.* GILMORE AND ANOTHER.

[KING'S BENCH DIVISION (Hilbery, J.), **July 21, 1941.**]

Landlord and Tenant—Repairs—Damages for failure to repair—Failure to deliver up in repair—Premises to be demolished—Intention to demolish—Construction of statute—Landlord and Tenant Act, 1927 (*c.* 36), *s.* 18 (1).

Statutes—Construction—Transposition or addition of words—Landlord and Tenant Act, 1927 (*c.* 36), *s.* 18 (1).

A landlord sued his tenant for damages for failure to deliver up the demised premises in repair according to the covenants in the lease. The landlord from 1937 had intended to pull down the premises and erect more modern premises on the site, but just before the expiration of the lease on Sept. 29, 1939, he was forced, by restrictions due to the war, to abandon that project. It was proved that the final letter abandoning the scheme for rebuilding was written on Oct. 6, 1939. The tenant contended that the case fell within the terms of the Landlord and Tenant Act, 1927, s. 18 (1), as the premises would at or shortly after the termination of the tenancy have been or would be pulled down, the proper construction of these words being that the premises would have been pulled down but for an extraneous cause :—

HELD : (i) although the final letter was written after the termination of the tenancy, there had been no intention to go on with the rebuilding scheme for some time before the termination and, therefore, on the facts, there was no intention to pull down the premises at the termination of the tenancy.

(ii) the proper method of construction of the latter part of the section was to transpose the word " would " so that the section read : " at or shortly after the termination of the tenancy have been or would be pulled down." Where a reasonable construction of a statute can be secured by transposition of the words, that method is to be preferred to that of adding words to the statute on the ground that they have been omitted.

[**EDITORIAL NOTE.** The decision herein clears up a slight difficulty in the construction of the subsection here considered. While the intention of the enactment was obvious, there was an awkwardness in the wording, and the court has here decided that the word " would " has accidentally been transposed. The court was urged to find that there had been an omission, but it is pointed out that, while the authorities are against supplying words thought to have been omitted, the objection to transposing words which appear to have been printed in their wrong order is not so strong. The object with which the enactment was passed was clear and it was also clear that, by a mere transposition of words, the subsection could be made to achieve that object.

AS TO DAMAGES FOR FAILURE TO DELIVER UP IN REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 220, 221, para. 241 ; and FOR CASES, see DIGEST, Vol. 31, pp. 340, 341, Nos. 4835-4844.]

Cases referred to :

(1) *Thompson* v. *Goold & Co.*, [1910] A.C. 409 ; 34 Digest 367, *2974* ; 79 L.J.K.B. 905 ; 103 L.T. 81 ; 3 B.W.C.C. 392.

(2) *Vickers, Sons & Maxim, Ltd.* v. *Evans*, [1910] A.C. 444 ; 34 Digest 458, *3754* ; 79 L.J.K.B. 954 ; 103 L.T. 292 ; 3 B.W.C.C. 403.

(3) *Lyde* v. *Barnard* (1836), 1 M. & W. 101 ; 42 Digest 639, *426* ; 5 L.J. Ex. 117.

(4) *Hughes* v. *Metropolitan Ry. Co.* (1877), 2 App. Cas. 439 ; 31 Digest 498, *6443* ; 46 L.J.Q.B. 583 ; 36 L.T. 932.

ACTION for damages for breach of repairing covenants of a lease, and in particular for wrongfully yielding up the premises in question out of repair at the end of the term, whereby the value of the reversion in the premises was diminished. The facts are fully set out in the judgment.

Cecil R. Havers, K.C., and *C. E. Rochford* for the plaintiffs.

A. T. Denning, K.C., and *David Weitzman* for the defendants.

A

Hilbery, J.: The plaintiffs' claim is for damages for breach of repairing covenants of a lease, and in particular for wrongfully yielding up the premises in question at the end of the term out of repair, whereby the value of reversion in the premises is alleged to have been diminished. The second defendant, who is the only defendant contesting the claim, B and who is hereafter referred to as the defendant, denies the breaches of covenant. Alternatively, in his defence and amended defence he pleads (i) that he relies on the Landlord and Tenant Act, 1927, s. 18, and alleges that the premises would, at or shortly after the termination of the tenancy, in the words of the section "have been or be pulled down, or such structural C alterations made therein as would render valueless the repairs covered by the covenant," and that, therefore, by the express provision of the section, no damage is recoverable for breach of the covenant to put or to leave in repair at the end of the term created by the lease in question, (ii) that the value of the reversion has not been diminished by the alleged breaches of D covenant, and (iii) that the plaintiff is estopped and precluded from saying that the value of the reversion is diminished or that the premises, in whatever state of repair they might be, would not, at or shortly after the termination of the tenancy, have been or be pulled down or such structural alterations made therein as would render valueless the repairs covered by E the covenants, because, by a letter dated Nov. 5, 1937, written by Messrs. Chesterton & Sons, the agents of the plaintiffs, and by the conduct of the plaintiffs through their servants or agents thereafter, the plaintiffs represented, and continued to represent, that it was their intention to demolish the premises, and the defendant was induced by that representation F to accept the same and to act thereon, and on the faith thereof the defendant did not (as he would otherwise have been entitled to do) avail himself of his rights under the Landlord and Tenant Act, 1927, and/or did not exercise such rights, in the belief that the plaintiffs could, by reason of that representation, avail themselves of the benefits of the G provisions contained in the Landlord and Tenant Act, 1927, s. 5 (3) (*b*), and did not fully execute the covenants to repair contained in the lease, as the same would be rendered useless, and that he did not, in consequence, enforce the covenants for repair contained in the sublease.

The relevant facts are these. By a lease dated Mar. 23, 1926, made H between the first plaintiff and the first defendant, the first plaintiff let to the first defendant the ground messuage shop and premises thereon standing being No. 59, New Bond Street, St. George's, Hanover Square, together with the landlord's fixtures and things then being in and upon the premises and more particularly described in the schedule thereto, to hold for the term of 14 years from Sept. 29, 1925. By this lease, the first defendant covenanted for herself and her assigns with the first plaintiff and the person or persons from time to time entitled to the reversion expectant on the term thereby granted, *inter alia*, as follows :

> (*a*) To paint in every third year of the said term and also in the last year thereof in a workmanlike manner in good oil colours with two coats at least all the outside wood iron and other work in upon or about the said premises previously or usually painted and in the seventh and last year of the said term to paint in like manner all the inside wood iron and other work in upon or about the said premises previously or usually painted and to enamel grain marble and varnish the parts usually grained marbled and varnished and whitewash and distemper all ceilings and plastered walls and repaper all rooms staircases and passages. (*b*) At her own expense throughout the said term without being thereunto required to well and substantially uphold repair support sustain maintain amend and keep in repair with good sound and well-seasoned oaken timber and such other materials as in and by the Acts of Parliament for rebuilding the city of London are appointed to be used in all buildings within the said city and liberties thereof and with all other needful reparations and amendments whatsoever the premises thereby demised and any additions thereto and all fixtures upon or about the same so as to render the same fit for the occupation of a tenant at rack rent. (*c*) At the end or sooner determination of the said term to deliver up unto the lessor the said premises and every part thereof so well and substantially maintained cleansed and repaired and kept as aforesaid together with all additions and improvements made thereto in the meantime and all fixtures of every kind which at the expiration or sooner determination of the said term might be affixed or fastened to or upon the said premises or any additions thereto.

In 1927, the first defendant, being then possessed of the term for the portion thereof then unexpired, assigned to the second defendant all her estate in the term, and the term became and was vested in the second defendant until the expiration thereof. In or about Dec., 1936, the first plaintiff sold to the second plaintiff the reversion expectant upon the determination of the term, but no conveyance thereof was executed. In those admitted circumstances, it was agreed that the plaintiffs were the proper parties to make the claim, and that the second defendant was the party responsible in damages in this action if responsibility were established.

The premises, said Blake, a witness for the plaintiffs and senior partner in a firm of estate agents, Messrs. Chesterton, the agents for this property, were amply ripe for pulling down and rebuilding when the term in question came to an end in Sept., 1939. In May, 1937, the defendant by letter asked for the grant of a renewal of the lease to him. After the survey of the premises which it was apparently the rule of the plaintiffs to require in such circumstances, the second defendant wrote on Oct. 14, 1937, referring to his application for a renewal of the lease, and added :

> I shall be glad to learn your decision as I must otherwise negotiate for other premises.

On Nov. 5, 1937, Messrs. Chesterton wrote in reply saying that the adjoining premises, No. 58, would come into hand at the same time, and that it was the intention of the plaintiff company to demolish both buildings and erect a new building. They offered the defendant certain accommodation on one or more of the upper floors in the proposed new building. By a letter of Dec. 16, 1937, the defendant refused this offer, on the ground that the accommodation offered would be unsuitable for his business, and there, so far as the defendant was concerned, the matter rested.

Early in 1939, the plaintiff company, through Messrs. Chesterton, began to take certain steps which were necessary preliminaries to the pulling down and reconstruction then in contemplation. By a letter dated Apr. 6, 1939, they applied to the London County Council for permission, under the General Interim Development Order, to erect a building on the site of Nos. 57, 58 and 59, New Bond Street, and submitted plans in duplicate. On June 6, 1939, the London County Council granted the permission asked on certain conditions, one of which was that the building should be begun within six months and completed within 18 months from June 1, 1939. On June 13, 1939, Messrs. Chesterton made formal application to the local authority for permission to pull down the buildings on the site in question and to rebuild, and on Aug. 25 that authority gave its approval, subject to conditions. One condition was that the works were to be commenced within three months and entirely completed within 12 months of the date of the approval, but this condition was altered on a further application so as to make the required times run from Christmas, 1939. The whole project of pulling down and rebuilding had advanced no further when war broke out on Sept. 3, 1939. No constructional drawings or specifications, the preparation of which would have formed the next stage if the project was carried out, had been prepared. I am satisfied by the evidence given on behalf of the plaintiffs that on the outbreak of war it became impossible to go on with the scheme, and there was no alternative to postponing it indefinitely.

The total cost of the premises which it had been contemplated should be erected would have amounted to many thousands of pounds, and the surveyor called for the defendant said that, even in the early days of the war, nothing could be built the cost of which exceeded £500, which amount was reduced to £200, and then to £100. He agreed that the only decision to which the plaintiffs could come was that to which they did come—namely, to postpone the whole scheme indefinitely.

On Sept. 26, 1939, Messrs. Chesterton wrote to the plaintiffs' solicitors saying that the plan mapped out for redevelopment of the site had been completely upset by the war, and, as far as they could see, it would not be practicable to start rebuilding during the war, and that in any case it was inadvisable while the risk of war damage was present. They advised approaching certain of the tenants for them to remain as quarterly tenants, and they added that meantime they could go on with the preparation of drawings and specifications for the rebuilding :

> . . . so that as little delay as possible need be occasioned when rebuilding becomes possible.

On Oct. 6, the plaintiffs' solicitors replied that the plaintiffs approved the suggestion about quarterly tenancies, but did not approve any further expenditure on preliminary work for rebuilding.

Such being the relevant facts, it is convenient to deal first with the question whether the premises were yielded up out of repair, and, if so, whether the diminution in value of the reversion, alleged by the plaintiffs, is established. The defendant vacated the premises on Sept. 29, 1939. There is really no question but that, in breach of covenant, he yielded them up out of repair. A schedule of dilapidations was prepared, and the cost of repairs required as a result of the defendant's breaches of covenant A amounted to £371. Both Stewart, of Chesterton & Sons, and Blake, the senior partner in that firm, gave evidence that, in the circumstances, that sum represented fairly the diminution in value of the reversion of the premises. The defendant, on the other hand, called Davies, a surveyor, who gave it as his opinion that, owing to the age and bad planning of the premises, B the only value of the property was the site value, and that it mattered not whether they were in or out of repair. In his opinion, their value as premises being nil could not be diminished through want of repair. Having heard these witnesses examined and cross-examined, I have come to the conclusion that the premises, old and ripe for pulling down though C they were, were still premises which had value as such apart from site value, and that there was a diminution in the value of the reversion through their being yielded up out of repair. Some of the tenants in occupation have stayed on as quarterly tenants, and there is evidence, which I think is correct, that, if the premises had been yielded up properly D repaired—and such proper repairs would have included, for example, the painting of the outside—the premises would have been more attractive and more readily lettable, and of greater value. In all the circumstances, I accept the evidence of the plaintiffs' witnesses as reliable on this point. I am satisfied that in this case the cost of making good the want of repair E is, as nearly as it can be assessed, the same as the diminution in the value of the reversion resulting from the breaches of the covenant to yield up in repair as required by the lease.

Subject, therefore, to the other contentions of the defendants, the plaintiffs' claim is established. I turn, therefore, to the defendants' two F other pleas, and I deal with them in the order in which I have already set them out. The Landlord and Tenant Act, 1927, s. 18 (1), provides as follows:

> Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether G general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid: and in particualr no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.

H There is no doubt that, on the facts which I have stated, prior to the outbreak of war there was an intention on the part of the plaintiffs to pull down the premises and rebuild. It was argued that that intention still existed at Sept. 29, 1939, when the term ended, because Lord Salisbury did not give his decision not to go on with the project until he wrote the letter quoted of Oct. 6, 1939. In my view, that is not the reasonable inference from the facts and the evidence. Apart from the evidence for the plaintiff, the surveyor called for the defendant himself said that the effect of the war was that the building was not pulled down, and that the war made it impossible to rebuild. I have no doubt that, when war broke out, the project of pulling down and rebuilding was at an end. It was at once certain that the pulling down and rebuilding could not be done "at or shortly after the expiration of the term," or within any period of time which could be ascertained, if, indeed, the project could ever be carried out at all. As a practicable matter, the project was ended by the outbreak of war. The fact that Lord Salisbury wrote on Oct. 6 to approve quarterly lettings and disapproving any expenditure on further preparations for the scheme in case at some future date it could be gone on with, taken in conjunction with the other evidence, does not prove that until then the intention was to go on with the scheme of pulling down and rebuilding. In fact, he reconsidered the whole scheme on the outbreak of war, and was prepared to be advised by Chestertons. Their view on the outbreak of war was that the scheme would at least have to be postponed indefinitely. It was really their view which put an end to the intention to rebuild, and it was no more than fortuitous that Lord Salisbury's letter, expressing an acceptance of this view, came after the expiration of the defendant's term and as late as Oct. 6. The fact is that, on the outbreak of war, and before Sept. 29, 1939, when the defendant yielded them up, the premises were not premises which would be pulled down at or shortly after the termination of the tenancy.

It was urged, however, that, in the circumstances, the defendant had shown that he brought the case within the other words in the latter part of sect. 18, because, it was said, the words of the section " would, at or shortly after the termination of the tenancy, have been or be pulled down " have something omitted, that the words " would have been pulled down " are appropriate only to express a conditional state of affairs—that is to say, were intended to read " would have been pulled down but for " something—and that, as the something is omitted, the court, in construing the section, should add it. The defendant contended that what was omitted was " but for an extraneous cause." The whole of the latter part of the section is apparently framed to provide a tenant with an answer to a landlord's claim for damages for yielding up the premises out of repair in breach of covenant, and applies only in the case of such a claim. Whatever it is that the tenant is empowered to show as an answer to such a claim, since the showing of it is to bar the recovery of damages, and the word "recovery," when read in conjunction with the word "damages," is appropriate only to refer to proceedings at law, the time for the tenant to show what the section makes it relevant for him to show must be after such proceedings have been taken against him and when he puts in his defence to the claim. The first hypothesis, therefore, must be that the end of the term created by the lease in question is already a thing of the past when the tenant sets up the answer to the landlord's claim, since that claim became a complete cause of action only when the tenancy ended. Turning to the language of the section with this in mind, I think that it is apparent at once that the language is not only ungrammatical but also inappropriate. In such proceedings, the tenant might well be empowered to say, " I can show that the premises will be pulled down within a short time," which can properly be held to be " shortly after the termination of the tenancy," or the tenant might be empowered to say, " I can show that the premises have been pulled down," but to say, as the section does, that the tenant may show that the premises would be pulled down at the end of the tenancy, at a time when the ending of the tenancy is already a thing of the past, is a strange way indeed of expressing what one can see that Parliament intended should be effected by the section. So far, I have examined the words of the section as though the word " would " were coupled to the word " be," and I have disregarded the words " have been " which immediately follow the word " would " in the arrangement of the language of the section as it stands in the Act. If, however, the word " would " is read as coupled with the words " have been," the question which at once arises is : " Would have been, when ? " The answer, according to the other words of the section, is : " At or shortly after the termination of the tenancy." How can any tenant, at a date after the tenancy has actually terminated, show that the premises would have been pulled down at the termination of the tenancy ? The expression read thus looks as if some words are missing. The words " would have been pulled down " suggest that they have not, because of some unfulfilled condition, without giving any clue to what that condition is. If the word " would " is read as only intended to be attached to the word " be," then the meaning may be said to be that the damages in question are not recoverable if it is proved that the premises are in fact to be pulled down within a time which may properly be described as " shortly after the expiration of the term." Even this unfortunately leaves a difficulty, for the section, in addition to the words " shortly after the expiration of the term," has the word " at," and, in a claim made after the end of the term, there could be no question of anyone showing that the premises would be pulled down at the end of the term. The tenant could show that the premises had been pulled down at that earlier date, but he could not show that they would be pulled down at a date already passed, when, *ex hypothesi*, they have not. Reading this section literally, as it stands, I think either that something is omitted or that the words in the section have, by inadvertence, been transposed. If something has been omitted, what is it ? The defendant urged in argument, as I have said, that the words " would have been " indicated a conditional state of affairs, and that the section required, as a matter of construction, that the court should read into the Act words not to be found there, and that the words which must be read in were " but for an extraneous cause." I remind myself that the courts have repeatedly refused to add words to a statute unless the Act itself, on a consideration of what it is intended to effect, makes it a matter of necessity so to do. As Lord Mersey said in *Thompson* v. *Goold & Co.* (1), at p. 420 :

> It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.

In *Vickers, Sons & Maxim, Ltd.* v. *Evans* (2), Lord Loreburn, L.C., said, at p. 445 :

> . . . we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

What Parliament aimed at in the Landlord and Tenant Act, 1927, was to provide certain reforms in the law of landlord and tenant, and in the section in question, in the second part with which I am dealing, what Parliament was seeking to effect is reasonably clear. As it has stood, the law enabled the landlord to recover by way of damages for the tenant's failure to yield up the premises in repair at the end of the tenancy the cost of the repairs required to be done to make good the tenant's failure, notwithstanding that, after the premises had been yielded up, the landlord had actually pulled them down, or was bound by law or contract, or for some other reason was about to pull them down, so that he would never in fact incur the cost of the repairs. This section was intended no doubt to alter that state of the law. The section, read as a whole, is apparently intended to enable a tenant to avoid having to pay as damages the cost of repairs in such circumstances. If that be right, and if words are to be added, what are the words which must be added so as to give effect to Parliament's intention ? The defendants say : " Read in by implication : ' but for an extraneous cause.' " I ask myself, why do these words express the necessary condition? Why should they be the words to be added? I see no reason, except that they suit the defendant in this case. That their inclusion might work injustice is illustrated by this case. War and the consequent restrictions imposed by the government are the extraneous causes which make pulling down and reconstruction impossible, so that the landlord has no option but to take possession, at the end of the term, of premises depreciated in value and rendered less lettable because of the tenant's breaches of his covenants, yet, if the tenant shows that, if the war had not occurred, the landlord would have pulled down, he has answered the claim and is excused by statute from making good his breaches of his solemn contract under seal by one penny piece. I can find nothing in the Act which drives me to conclude that Parliament intended any such result.

There would be more common sense—if it were a matter of common sense, which, of course, it is not—in reading in the words " but for such proceedings." That would at least give a just protection to a tenant who, though he could not show that the premises had been pulled down, could yet show that the landlord had refrained only on account of the claim for damages, and would pull them down after judgment. The alternative words I have just mentioned at least are certain, and deal with a situation which might be likely often to arise. A landlord might well hold his hand

and not demolish until he had recovered his damages from his former tenant, though he had made concluded arrangements to pull down, or was otherwise bound to pull down, and would do so after judgment. I am unable, therefore, in construing the section, to put into it the words for which the defendant contends, or to construe it as if it contained those words.

Without addition to the words, how, then, is the section to be construed so as to effect the intention of the legislature ? Looking at the words again, it is observable that, if they are treated as not having been transposed inadvertently, they do not provide the tenant with what would seem to me his most obvious reason for not being made to pay the damages in question. If the words are read as they stand, the tenant would have two answers to the claim for damages. He could show that the premises would have been pulled down, or he could show that the premises would be pulled down, but no provision is made for his showing that the premises actually have been pulled down.

Having regard to the particular state of the law which this section was passed to reform, it is almost inconceivable that the section was not intended expressly to give the tenant an answer to the landlord's claim for these particular damages if he could show that the premises had actually been pulled down, but was intended to enable him to answer the claim by showing that the premises would be pulled down, or would have been pulled down but for something which is left unexpressed. If, however, the words have accidentally been transposed, and are so treated, then there is no such omission. If the words are construed so that the word " would " is regarded as accidentally out of place, the section will read : " and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, at or shortly after the termination of the tenancy have been or would be pulled down." Is it, however, open to the court to transpose the words or to construe the words as if they were transposed? No less an authority than PARKE, B., in *Lyde* v. *Barnard* (3) had no doubt, apparently, but that, in construing an Act, the court might, in a proper case, transpose the language. In that case the court was examining the words of the Statute of Frauds Amendment Act, 1828, s. 6, which provides as follows :

> No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

All the court took as a key to the problem of construing the section the earlier state of the law which the section had been passed to remedy. It is true that no member of the court based his decision upon a transposition of the words such as would at once apparently give effect to what was Lord Tenterden's intention and at the same time remedy that which was ungrammatical in the section, but, speaking of the words "to the intent or purpose that such other person may obtain credit, money, or goods upon," PARKE, B., said in *Lyde* v. *Barnard* (3), at p. 115 :

> The words of the clause in question are, it is to be observed, clearly inaccurate, probably from a mistake in the transcriber into the Parliamentary roll. We must make an alteration in order to complete the sense, and must either transpose some words, and read the sentence as if it were "to the intent or purpose that some other person may obtain money or goods upon credit" or interpolate others, and read it as if it were "to the intent or purpose to obtain credit, money or goods *on such representation*." If we assume Lord Tenterden's object to have been merely to prevent evasion of the Statute of Frauds, as we think it was, and use this as a key for the construction of the clause, it would induce one to prefer the former alteration, by which the clause is made clearly to apply only to cases where the purpose of the representation is to obtain personal credit for the third person . . .

A little later on he says, at p. 116 :

> I think it highly probable that the first correction would make the clause such as Lord Tenterden originally wrote it ; but whichever is adopted, I am of opinion that the statute applies only to those cases in which the representation is made, relating to the trustworthiness of a third person, with the intent that he may obtain personal credit on the faith of such representation.

So great an authority as PARKE, B., seems to have regarded it as unquestionably open to the court, where it is faced with language in a section of an Act of Parliament which is ungrammatical as it stands, but where, none the less, the intention of the section can be seen, to construe the section as though the words were transposed if by so doing effect can be given to the intention. Since, as the language stands, it does not make sense or effect the apparent intention of the section, and since a construction which, in effect, transposes one word which may well have been out of place inadvertently remedies an otherwise obvious omission of a matter radically important to the intention of the section, and obviates as well the necessity for concluding that the words to express a vital condition have been altogether left out, I am of opinion that the section should be construed as though the word "would" were transposed in the manner I have indicated. The defendant has failed to show that the premises in question have been pulled down or reconstructed, or would be pulled down or reconstructed, at or shortly after the expiration of his tenancy. This plea of the Landlord and Tenant Act, 1927, s. 18, therefore, fails.

With regard to the defendant's other plea, the only evidence that the defendant was induced by the landlord's expressed intention to pull down the premises not to exercise the rights given to him under the Landlord and Tenant Act, 1927, s. 5, and not to do the repairs required by his covenant, and not to compel his subtenants to repair as pleaded is that of the defendant. Having heard the defendant, I regret to say that I am unable to accept him as a reliable witness. He completely failed to satisfy me that he refrained from doing any of these things because the landlord wrote the letters I have referred to and conveyed by them that it was his intention to pull the premises down at the end of the term. Whether, therefore, this plea is put as estoppel or on the broader principle stated in *Hughes* v. *Metropolitan Ry. Co.* (4), it fails for lack of proof of the necessary facts. There must be judgment for the plaintiff for £371, or such other figure as is agreed between the parties.

Judgment for the plaintiff.

Solicitors: *Nicholson, Freeland & Shepherd* (for the plaintiffs); *Gale & Phelps* (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

WEST RIDING COUNTY COUNCIL *v.* WILSON.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J.), **June 26, 1941.**]

Emergency Legislation—Procedure—Cultivation according to the rules of good husbandry—Termination of contract of tenancy—Consent of Minister—Defence (General) Regulations, 1939 (*S.R. & O.*, 1939, *No.* 927), *reg.* 62 (2), (3)—*Cultivation of Lands Order*, 1939 (*S.R. & O.*, 1939, *No.* 1078), *art.* 1.

The defendant was tenant from year to year of a farm belonging to the plaintiffs. From time to time representatives of the local war agricultural executive committee had visited the farm, and, on account of the cultivation not being carried on according to the rules of good husbandry, his tenancy was terminated, "subject to the approval of the Minister," by virtue of the Cultivation of Lands Order, 1939, art. 1, and the Defence (General) Regulations, 1939, reg. 62 (2), (3). Subsequently, the committee received a letter signed by the assistant land commissioner and expressed to be authorised by the Minister of Agriculture and Fisheries, giving the requisite consent. In due course, the defendant was informed of the committee's decision, but refused to comply with it. The plaintiffs then brought this action to recover possession of the farm. On behalf of the defendant, it was contended, *inter alia,* (i) that the consent of the Minister had not been obtained, inasmuch as there was nothing to show that the official signing the letter was authorised by the Minister in that behalf, or that the Minister had power to delegate his authority to give the consent, (ii) that the consent of the Minister had not been obtained before the committee made their decision, (iii) that the committee had not properly exercised their discretion in the matter:—

HELD: (i) the consent of the Minister had been properly obtained, since the letter was expressed to be written with his authority, and power to delegate his authority for the purpose of giving such consents must be implied.

(ii) the committee's decision to terminate the tenancy was expressly made subject to the approval of the Minister, and did not become final until the consent of the Minister was obtained.

(iii) the decision of the committee had been arrived at *bona fide,* and after due consideration had been given to the contentions of both parties, and ought not to be interfered with by the court.

[**EDITORIAL NOTE.** At common law there is an implied covenant on the part of an agricultural tenant to cultivate the land in a husbandlike manner according to the custom of the country, unless there is an agreement between the parties to the contrary. In the case of agricultural holdings as defined in the Agricultural Holdings Act, 1923, this principle is given statutory recognition by the provision that, where a contract of tenancy terminates by reason of a notice given by the landlord, he will not be liable to pay compensation for disturbance, if the tenant was not, at the date of the notice, cultivating the holding according to the rules of good husbandry. Sect. 25 of that Act, however, provides that, notwithstanding any provision in any contract of tenancy to the contrary, a notice determining the tenancy is invalid if it purports to determine the tenancy before the expiration of twelve months from the end of the then current year of the tenancy. When war was seen to be imminent, it became obvious that a speedier method of dealing with failure to cultivate in accordance with the rules of good husbandry was necessary, and, accordingly, the Cultivation of Lands Order, 1939, was made under the Defence (General) Regulations, 1939, delegating the Minister's powers under regs. 51, 62 and 85 to the war agricultural executive committees on the terms therein prescribed. Under the order, the right to determine the tenancy is not affected by the Agricultural Holdings Act, 1923, s. 25. The powers of the committee must, of course, be exercised in accordance with the principles laid down by Lord Loreburn in *Board of Education* v. *Rice* (1). They must fairly hear both sides and their deliberations and decisions must be free from bias, but, provided they reach a *bona fide* decision observing these principles which must guide every body acting judicially, their decision is not subject to review. An important point is raised as to the delegation of the Minister's powers of consent. The practical carrying out of the Minister's duties is shown to necessitate some method of delegation and the delegation here adopted is approved by the court. It is sometimes important to know the correct form in which such consent should be given.

For the Cultivation of Lands Order, 1939, see BUTTERWORTH'S EMERGENCY LEGISLATION, Regulations [1] 3.]

Case referred to:

(1) *Board of Education* v. *Rice*, [1911] A.C. 179; 19 Digest 602, *290*; 80 L.J.K.B. 796; 104 L.T. 689.

Action to recover possession of a farm. The facts are fully set out in the judgment.

C. L. Henderson for the plaintiffs.

H. J. Astell Burt for the defendant.

Viscount Caldecote, L.C.J.: This is an action by the West Riding County Council to recover possession of a farm of 40 acres known as Becklands Farm, Leathley. The farm was let in 1922 to the defendant. There was a subsequent tenancy agreement which expired, but the defendant continued as tenant of the plaintiffs from year to year on the terms of that agreement. The ground upon which possession is asked is that the defendant was not cultivating the holding according to the rules of good husbandry and that the tenancy was, therefore, terminated by the West Riding War Agricultural Executive Committee by virtue of powers vested in them by the Cultivation of Lands Order, 1939.

By the Defence (General) Regulations, 1939, reg. 62, if it appears to the Minister of Agriculture at any time that the tenant of a holding is not cultivating it according to the rules of good husbandry, he may terminate the tenancy by the means specified, on such date as may be specified in the notice. By reg. 66, the Minister of Agriculture is empowered to make an order providing for the delegation of all or any of his functions under a number of regulations, one of which is reg. 62. In due course, the Minister of Agriculture delegated his powers by the Cultivation of Lands Order, 1939. The persons to whom he delegated his powers were the persons who are for the time being appointed by the Minister as members of the war agricultural executive committee for any administrative county in England or Wales, and they were authorised thereby to exercise the powers of the Minister under reg. 62. The regulation then provided that the committee should not, without the consent of the Minister in writing previously given, take possession of any land or terminate the tenancy of any land otherwise than by agreement. Then there is a later provision to which I shall have to refer in a moment.

The history of this tenancy, so far as the war agricultural executive committee are concerned, goes back a little time. It appeared, as a result of reference to certain documents which contained notes and reports by Richardson, the agent of the plaintiffs, that the attention of the agricultural committee of the plaintiffs had been called in Sept., 1938, and possibly earlier, to the unsatisfactory nature of the cultivation of this holding, and it appeared—and indeed it is admitted by the defendant—that on a number of occasions the holding was visited by Richardson, that on one occasion it was visited by the chairman and vice-chairman of the committee, and that the defendant not only was given a number of opportunities of discussing the matter with the members of the agricultural committee who visited the farm, but also took advantage of those opportunities, no doubt, to point out anything which he desired.

After the appointment of the war agricultural executive committee, visits were paid to the farm and a number of discussions and inspections took place. At one time, the matter went so far as to lead to a form of surrender of his occupation by the defendant, but that was subsequently withdrawn, and there was a promise on his part to do his best to improve the state of the holding. Finally, however, on Dec. 2, he received a letter from the plaintiffs informing him that the matter of his holding would come before the executive committee. The terms of the letter were these:

> I have to inform you that your farm has been reported to this committee as being in bad order and condition, with a recommendation that your tenancy should be terminated at an early date. This matter will be up for consideration some time next week, but I thought it only right to give you as long a warning as possible.

That seems to be an invitation to make any representations, or at any rate to give an opportunity for making any representations, either in writing or verbally, which the defendant might be minded to make.

When the matter came before the appropriate bodies, it was decided, "subject to the approval of the Ministry," to terminate the defendant's tenancy. On Dec. 11, the matter came before the cultivations sub-committee, which I observe was a sub-committee of what may I call, for convenience, the executive committee. It was there decided, as I have said, that, subject to the approval of the Ministry, the tenant of Becklands Farm, Leathley, should be dispossessed. That was approved by the executive committee on the same day, and was adopted. In accordance with the condition that it should be subject to the approval of the Minister, application was made to the Minister for his consent, and a letter dated Dec. 14 was received, signed by Dudley A. Hole, assistant land commissioner, authorised by the Minister of Agriculture and Fisheries, expressing consent by the Minister of Agriculture and Fisheries to the termination of Charles Wilson's tenancy. In due course, Wilson was informed of this decision, but he declined to give up possession.

The first question which arises on the defence is whether or not I have jurisdiction to entertain this case. Counsel for the defendant recognises that on that point he has to face two decisions of the Court of Appeal, and he does not ask me to come to any conclusion contrary to those decisions. In my judgment, however, even apart from the decisions of the Court of Appeal, the point is a bad one, and it is made quite conclusive, so far as I am concerned, by the two decisions to which I have been referred.

The next matter raised in the defence was the question as to the cultivation of the holding, and there was a statement that the defendant had never received any complaints, either from the plaintiffs or from the war agricultural executive committee, as to the manner in which he had cultivated the farm. That is quite plainly contrary to the facts. Wilson was treated, as I think, with a good deal of consideration. Indeed, he seems never to have thought it right to protest or complain, although no doubt he was doing everything that an honest Yorkshireman might be expected to do to satisfy the executive committee. The fact that he was hampered by the absence or shortage of labour or by bad weather conditions or by other difficulties is really not material to the simple question of fact as to whether the holding had been cultivated, and was being cultivated, according to the rules of good husbandry.

The next point—and this is really the substance of the defence—is that the war agricultural executive committee were not acting *bona fide* in arriving at their decision. A number of particulars were set out, to which I need not refer in detail, because counsel for the defendant has taken certain points with which it is necessary for me to deal. The first of them is that there was a duty on Richardson, as agent for the landlords, not to take part in the decision of the war agricultural executive committee. I am satisfied that he did not take part. Questions were addressed specifically to him in the witness-box, and to other witnesses, all of whom were unanimous in agreeing that he did not take part in the decision.

The next point which was taken was that there was a breach of the Cultivation of Lands Order, 1939, art. 4, the breach consisting of the fact that a member of the committee, being an agent of the owner or occupier, took part in the decision of the war agricultural executive committee. In support of that submission, it is said that Turner, who was a member of the executive committee, took part in the decision of Dec. 11 to dispossess the defendant subject to the consent of the Minister, and that he did that being the agent of the owner or occupier. However, when it is realised that it was not even suggested that he became the agent of the owner or occupier until he was entrusted with the duty of re-letting the farm, it will be seen how untenable this submission is. I do not accept the submission that he was the agent of the owner or occupier within the meaning of the Cultivation of Lands Order, 1939, art. 4 (1), but, even assuming that he did become the agent of the owner or occupier, because he had been entrusted, together with the deputy land agent, to find a new tenant, I do not accept the submission that there was any breach of art. 4.

The next point is as to the consent of the Minister. It is perfectly plain that, in order to dispossess the defendant, the consent of the Minister in writing should be given. The first point which is taken is that consent was not obtained before the decision of the committee. I think that it would be wrong to hold that the decision of the committee was finally made before the consent of the Minister was obtained. It was not. It was only a conditional decision, which became complete when the Minister's consent was received, and it is to be observed that what the Cultivation of Lands Order, 1939, prohibits is the taking of possession of any land without the consent of the Minister. I am satisfied that here there was no attempt to take possession of the land until the consent of the Minister had been obtained. That, however, is subject to the point that the consent of the Minister never was obtained. I think that it was obtained. The letter of Dec. 14 is signed by an official who was authorised, according to the letter, by the Minister of Agriculture and Fisheries, and I accept that as proof of the satisfaction of the condition that the Minister's consent in writing must first be obtained.

The further point is taken that the letter from Hole is void because the Minister had no power to delegate his responsibility to Hole. I do not read the letter in that way. Hole was authorised, according to the letter, by the Minister of Agriculture and Fisheries, and, in the absence of any evidence that he was not so authorised, I accept that letter as the letter of the Minister, or as the consent of the Minister in writing. It is not the case that all consents of ministers have to be signed by the ministers themselves. The business and the duties of ministers of the Crown would very often be quite impossible if they had to sign all the documents in which their consent was given or their opinion expressed.

I would say that I find nothing at all which supports the suggestion that the executive committee did not act *bona fide* and it is right that that should be said. The individuals who compose the war agricultural executive committee, as is so commonly the case in connection with these agricultural committees of the counties of England, are acting in various capacities. I think that there was scrupulous care on their part to give the defendant every possible consideration, and I think also that they and their agent, Richardson, were careful to observe, not only the formalities and the rules, but also the spirit in which they should be operated.

The last, and in some ways the most important, of these points is that arising out of, or based upon, the decision of the House of Lords in *Board of Education* v. *Rice* (1). That is an extremely well-known decision, and nothing which I desire to say or shall say will detract in any way at all from the importance of the principle there laid down that it is right, in cases where the executive have to arrive at decisions, as Lord Loreburn, L.C., said, at p. 182, that they must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything. Those words, of course, are easily understood and very important in a class of cases like *Board of Education* v. *Rice* (1), but here, as I have already pointed out, the question to be decided was a pure question of fact—namely, whether the land was cultivated in accordance with the rules of good husbandry. I further point out that on more than one occasion the defendant was present when his holding was visited. He then had an opportunity of being heard, and no doubt was heard, and I find that nothing whatever was done here which offended in any way against the principle laid down by Lord Loreburn. I find first of all that the defendant was given opportunities of saying anything which was right, and I say further that, even if he had not had an opportunity, as the sole question was, not whether the defendant was deserving of pity or sympathy, but whether the holding was cultivated in accordance with the rules of good husbandry, that was a matter to be determined by inspection of the holding, and not by the examination of witnesses. It is to be realised that the war agricultural executive committee are exercising powers delegated to them by the Minister. The powers of the Minister are to act if it appears to him that the holding is not cultivated in accordance with the rules of good husbandry. For these reasons, I have come to the conclusion that the plaintiffs are entitled to the relief for which they ask.

Solicitors: *Warwick Williams & Marchants*, agents for *Sir Joseph McGrath*, Clerk to the West Riding County Council, Wakefield (for the plaintiffs); *Hewitt, Woollacott & Chown*, agents for *Barret, Chamberlain & McDonnell*, Otley (for the defendant).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

END OF VOLUME 2.